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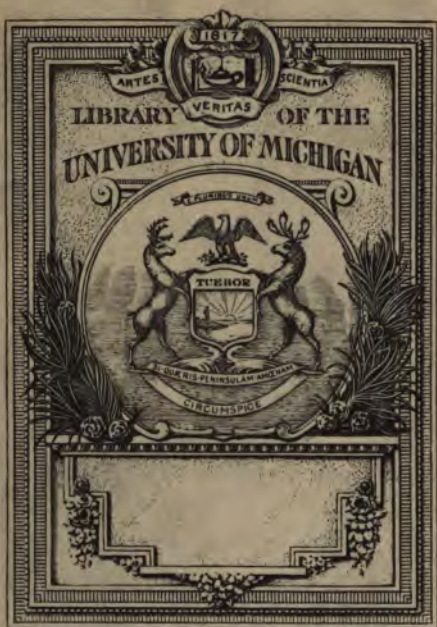
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THE LAW

OF

MUNICIPAL CORPORATIONS;

TOGETHER WITH A BRIEF

SKETCH OF THEIR HISTORY,

AND A TREATISE ON

MANDAMUS AND QUO WARRANTO.

By **J. W. WILLCOCK, Esq.**

OF THE INNER TEMPLE, BARRISTER AT LAW.

"The institution of cities into communities, corporations, or bodies politic, and granting them the privilege of municipal jurisdiction, contributed more, perhaps, than any other cause, to introduce regular government, police, and arts, and to diffuse them over Europe."

ROBERTSON'S CHARLES V.

LONDON:

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pp. 10

P R E F A C E.

A COLLECTION of the Cases relative to the Law of Corporations has been long wanted : upwards of thirty years have elapsed since the appearance of the last work which professed to treat generally on the subject. Under the genius of Lord Mansfield it began to assume the regularity of system ; but had not attained its perfection when Mr. Kyd's work came before the public. I at one time entertained thoughts of republishing it, introducing the modern decisions in the form of notes : but an uniform and original work appeared to present so many advantages over a text loaded with annotations, that I abandoned the intention. This Treatise is more limited than that of Mr. Kyd, being confined to Municipal Corporations ; whilst his professed to embrace the consideration of all Corporate Bodies. I have also refrained from entering upon the law relative to the property of Corporations. This I have done to avoid the prolixity and confusion from which the former work is by no means free ; and it is my intention, should this

volume be favorably received, to supply both these deficiencies, together with the law relating to inferior Courts. My only claims on the Profession are founded on a laborious investigation of cases from the most remote period of legal authority, and an endeavor to render the work useful by arranging it in an analytical form. To effect this a degree of repetition was necessary, which might have been avoided by offering a mere abridgment of cases. That there are not many errors in the work I am not vain enough to suppose ; but if in the main the Profession shall esteem it useful, I shall not consider the labor I have devoted to be without its reward.

*7, King's Bench Walk, Temple,
June, 1827.*

TABLE OF CONTENTS.

HISTORICAL SKETCH OF MUNICIPALITIES, *page 1.*

PART I.

CHAPTER I.

CONSTITUTION, page 21.

	Tit.
SECT. I. CREATION	1
I. <i>Corporation by Prescription</i>	2
II. <i>By Statute</i>	10
III. <i>By Charter</i>	13
SECT. II. NAME	35
SECT. III. FORM	54
SECT. IV. CORPORATE ASSEMBLY	58
I. <i>Notice</i>	63
II. <i>Time</i>	86
III. <i>Place</i>	88
IV. <i>Persons</i>	90
1. <i>President</i>	94
2. <i>Classes.</i>	115

CHAPTER II.

ORDINANCES.

	Tit.
SECT. I. CUSTOMS.....	140
I. <i>Valid Customs</i>	142
II. <i>Void Customs</i>	172
III. <i>Customs Enforced</i>	182
IV. <i>Customs Plead</i>	188
V. <i>Customs Proved</i>	200
SECT. II. REGULATIONS BY CHARTER, page 95.	
<i>Regulations by Statute</i>	226
SECT. III. BY-LAWS, page 99.	
I. <i>Who may make By-laws</i>	229
II. <i>Who are Bound</i>	244
III. <i>What By-laws are valid or void, p. 107.</i>	
1. <i>By-laws concerning Powers</i>	253
2. <i>By-laws concerning Offices</i>	293
3. <i>By-laws concerning Admission</i>	310
4. <i>By-laws concerning Freemen in Particular</i>	318
5. <i>By-laws concerning the government of the Place</i>	332
<i>Penalty</i>	350
IV. <i>By-laws in affirmance of a particular Custom</i>	351
<i>Penalty of By-law on Custom</i>	368
V. <i>How By-laws shall be construed</i>	381
VI. <i>How Enforced</i>	396
VII. <i>How Plead</i>	423
VIII. <i>Other methods of enforcing By-laws</i>	443

CHAPTER III.

ELECTION, &c. page 182.

	Tit.
SECT. I. INCHOATE RIGHT OF ADMISSION....	456
SECT. II. WHO ARE ELIGIBLE AS FREEMEN OR OFFICERS, page 188.	
I. <i>As Freemen</i>	472.
II. <i>As Officers</i>	480
SECT. III. IN WHOM THE RIGHT OF ELECTION IS VESTED	513
SECT IV. ESSENTIALS TO A VALID ELECTION.	
I. <i>Vacancy</i>	526
II. <i>At what Time</i>	529
III. <i>Elective Assembly</i>	540.
IV. <i>Form of Election</i>	544
SECT. V. ADMISSION	555
I. <i>When admission may be</i>	559
II. <i>Who are to admit</i>	565
III. <i>Form of Admission</i>	575.
SECT VI. REFUSAL OF OFFICE	587
SECT. VII. APPOINTMENT OF MINISTERIAL OFFICERS	598

CHAPTER IV.

AMOTION, &c. page 237.

SECT. I. RESIGNATION.....	610
SECT. II. FORFEITURE.....	625

	Tit.
SECT. III. FORMAL AMOTION, page 245.	
I. <i>Who may amove</i>	629
II. <i>When they may amove</i>	636
III. <i>For what cause</i>	648
1. <i>Sufficient Cause</i>	649
2. <i>Insufficient Cause</i>	669
IV. <i>In what form</i>	691
V. <i>Effect of an Amotion</i>	704
VI. <i>Restoration</i>	705
SECT. IV. DISFRANCHISEMENT	709

CHAPTER V.

CORPORATORS, page 277.

SECT. I. THEIR TITLE	719
I. <i>How consummated</i>	720
II. <i>How investigated</i>	728
III. <i>Confirmation of Title</i>	731
IV. <i>Duration of Title</i>	755
SECT. II. THEIR POWERS, PRIVILEGES, DUTIES, ACTS, &c.	769

CHAPTER VI.

CONFIRMATION, page 319.

I. <i>By Statute</i>	835
II. <i>By Charter</i>	841

Tit.

CHAPTER VII.

DISSOLUTION, page 325.

I. <i>By Loss of Integral Part</i>	853
II. <i>By Surrender</i>	861
III. <i>By Scire Facias</i>	864
IV. <i>By Quo Warranto</i>	869

CHAPTER VIII.

REVIVAL, page 337.

PART II.

CHAPTER I.

CORPORATE DOCUMENTS, p. 343.

I. <i>Evidence</i>	1
II. <i>Custody</i>	8
III. <i>Production</i>	13
IV. <i>Inspection</i>	15

CHAPTER II.

MANDAMUS, page 354.

SECT. I. APPLICATION FOR THE WRIT	36
I. <i>To Elect</i>	46

	Tit.
II. <i>To take Office</i>	71
III. <i>To Admit</i>	74
IV. <i>To Amove</i>	92
V. <i>To Restore</i>	96
VI. <i>Miscellaneous</i>	110
SECT. II. RULE AND WRIT.	
I. <i>Rule Nisi</i>	117
II. <i>Rule Absolute</i>	123
III. <i>Form of Writ</i>	128
SECT. III. PROCEEDINGS BEFORE RETURN	161
SECT. IV. RETURN, page 401.	
I. <i>General Remarks</i>	175
II. <i>To Elect</i>	196
III. <i>To Admit</i>	200
IV. <i>To Restore</i>	216
SECT. V. SUBSEQUENT PROCEEDINGS.....	247
SECT. VI. AMENDMENTS	272
SECT. VII. ACTION FOR FALSE RETURN	280
SECT. VIII. CRIMINAL INFORMATION	298
SECT. IX. PEREMPTORY MANDAMUS	302
SECT. X. ATTACHMENT	317

CHAPTER III.

QUO WARRANTO,

AND

INFORMATION IN THE NATURE OF QUO WARRANTO.

SECT. I. QUO WARRANTO	331
SECT. II. INFORMATION IN THE NATURE OF QUO WARRANTO	332

	Tit.
SECT. III. INFORMATION BY THE ATTORNEY	
GENERAL	335
SECT. IV. INFORMATION AT COMMON LAW....	339
SECT. V. INFORMATION UNDER THE STATUTE	352
SECT. VI. PROCEEDINGS ON THE INFORMA- TION.	
I. <i>Before plea</i>	428
II. <i>Plea</i>	441
III. <i>Replication, &c.</i>	466
IV. <i>Trial</i>	479
V. <i>Judgment</i>	482
VI. <i>Amendment</i>	500
VII. <i>Costs.</i>	
1. <i>Prosecutor's</i>	510
2. <i>Defendant's</i>	514
3. <i>Of either Party</i>	523

ERRATA.

Part I. tit. 42. line 9. *for* Lime *read* Lynne.

94. 2. *read* "corporate assembly."

102. 2. *after* "elected" write "where there was no power of holding over."

115. in the head line, *dele* "Definite."

283. line 8. *for* "burgesses" write "aldermen."

Note (751) add R. v. Hughes, 5 B. C. 892.

INDEX OF CASES.

N. B. The numerals refer to the Part, and the figures to the Paragraphs.

A.

Acherley v. Bell, II. 31.
 Adley v. Reeves, I. 245. 396. 446, 447.
 Amherst's, II. 44. 114.
 Argyle v. Hunt, I. 201.
 Ashby v. White, I. 819, 820.
 Asthill v. Clarke, I. 20.
 Atesley v. Bell, II. 31.
 Atherford v. Beard, II. 25.
 Attorney General v. Farnham, I. 36.
 ——— Gower, I. 858.
 ——— Liverpool, I. 327.
 ——— Trinity House, II. 503.
 Austin v. Osborne, I. 524.
 Awdley v. Joy, II. 34. 75.
 Ayray, I. 42.
 Adams a. Prigge, I. 247.
 Alexander a. Harrison, I. 417.
 Alport a. Chute, I. 23.
 Archer a. Player, I. 189. 331. 373, 6.
 380. 402, 7. 450. 775.
 Atkinson a. Hodgson, I. 206.
 Atkis a. Hodges, II. 25.
 Aylmer a. Roe, II. 29.

B.

Bab v. Clarke, I. 448. 452. 4.
 Bagg's ca. I. 188. 634. 680, 6. 690, 2. 700.
 709, 710. 717, 718. II. 223. 280. 315.
 Ballard v. Bennett, I. 331. 376. 402, 5, 6.
 Banbury, I. 853.

Barber v. Bolton, I. 290.
 ——— Surgeons v. Pelson, I. 300. 396.
 425.
 Basset v. Barnstaple, I. 726. II. 181.
 Baston's ca. I. 619. 623.
 Bateman v. Phillips, II. 22.
 Bates v. Winstanley, I. 773.
 Bath v. Glazby, I. 185. 352. 375.
 Baxter's ca. II. 75.
 Beard v. Webb, I. 417.
 Bedford v. Fox, I. 218. 235. 242.
 Bernardiston's ca. II. 97.
 Berwick v. Johnson, I. 182. 211. 219.
 228. 341. 371.
 Blacquire v. Hawkins, I. 200, 5, 6.
 Bodwick v. Fennel, I. 143. 182, 4, 6, 7.
 350. 371, 4, 8.
 Bolton v. Throgmorton, I. 159. 168. 171.
 348.
 Bonham's ca. I. 223, 4.
 Bosworth v. Budgen, I. 151. 169. 354.
 365, 8. 401.
 ——— Hearne, I. 337. 359.
 Braithwaite's ca. I. 633. II. 75. 188.
 236. 241.
 Bret's ca. II. 75.
 Bricklayers and Plasterers, I. 360.
 Bridgnorth ca. II. 318.
 Brigg's ca. 430.
 Bright v. Eynon, II. 481.
 Britton v. Gradon, I. 49.
 Broadnax ca. I. 153. 359. 403. 412.
 Brown v. London, I. 800. 807.

- Bruce's ca. I. 625, 9. 658. 710. II. 93.
 223. 396.
 Buckley v. Palmer, II. 306, 9.
 Buller v. Palmer, I. 239. 861. 877.
 Butchers v. Bullock, I. 431.
 — Morey, I. 249, 250. 340.
 Butler's ca. I. 864.
 — v. Palmer, I. 289. 877.
 — v. Rews, II. 287.
 Baldo a. Fazakerly, I. 412, 13, 17. 421, 2.
 Barfoot a. Palmer, I. 159. 171.
 Barlow a. Horners, I. 248.
 Barnstaple a. Basset, I. 726. II. 181.
 Bartrum a. Pierce, I. 244, 6, 7, 8, 9.
 336.
 Beard a. Atherford, II. 25.
 Beaufort a. Tooker, I. 24.
 Bell a. Acherley, II. 31.
 — Atesley, II. 31.
 Bennett a. Ballard, I. 331. 376. 402, 5, 6.
 Bentham a. Plummer, I. 200.
 Bernardiston a. London, I. 331. 368. 376.
 402. 436.
 Berry a. Parry, I. 128. 235. 343.
 Blamire a. Carlisle, I. 36. 43.
 Bolton a. Barber, I. 290.
 — Jeffs, I. 139. 327. 404. 777.
 — Stafford, I. 44, 6.
 — Williamson, I. 162.
 Braddock a. Hesketh, I. 145. 178. 182,
 4, 6. 205. 350, 2. 368. 371, 3, 6. 798.
 800.
 — Williams, I. 178.
 Brown a. Jollie, I. 158.
 — Herring, II. 434.
 — Weavers, I. 148, 9. 184.
 Budgen a. Bosworth, I. 151. 169. 354.
 365, 8. 401.
 Buller a. Scarborough, I. 39. 859.
 Bullock a. Butchers, I. 431.
 Bury a. Phillips, I. 513.
 Burnis a. Schuldham, II. 20.
- C.
- Cambridge v. Herring, I. 308.
 — York, I. 38.
- Cameron v. Gray, II. 254. 291.
 Canterbury ca. I. 795.
 — Trinity Col. II. 118. 174.
 Carlisle v. Blamire, I. 36. 43.
 Cart v. Mogg, I. 417.
 Chapman v. Wish, I. 641.
 Chaunt v. Smart, II. 324.
 Chute v. Alport, I. 23.
 Child v. Hudson's Bay, I. 231. 328.
 Clack v. Dickson, I. 410.
 Clarke's ca. I. 176. 318, 19. 443, 8. 452, 4.
 II. 75.
 — v. Tucker, I. 387, 8. 413, 5.
 450.
 Claridge v. Evelyn, I. 504. II. 381.
 Clifton's ca. II. 343.
 Clithero, II. 77.
 Colchester ca. I. 260, 7. 800, 7.
 — v. Godwin, I. 3. 5. 44. 143.
 169. 211. 353, 5. 365, 6. 371, 2. 383.
 429.
 — v. London, I. 839.
 — v. Lowther, I. 327.
 — v. Seaber, I. 3. 39. 41. 55. 856,
 9. 870.
 Colt v. Coventry, I. 526.
 Commins v. Oakhampton, I. 804.
 Corporations' ca. I. 258. 427. 441. 764.
 Cotton v. Davis, I. 135.
 Coventry ca. II. 321, 2.
 Craig v. Norfolk, I. 24. 723, 4, 5.
 Crawford v. Powell, I. 736, 7. II. 86. 113.
 295.
 Cross v. Smith, I. 772.
 Cudden v. Estwick, I. 153. 181. 246, 7,
 364, 9. 370, 1. 380.
 Cursey v. Smith, II. 114.
 Chandler a. Horn, I. 189.
 Chippenham a. Dummer, I. 831.
 Clarke a. Asthill, I. 20.
 — Bab, I. 448. 452. 454.
 — Exeter, I. 349.
 — Gabriel, I. 617.
 — Vintners, I. 152. 163. 412, 15.
 Clerke a. Guilford, I. 252. 386. 440. 581.
 — Watson, I. 207. 411. 2, 7, 9.
 Coates a. London, I. 164, 5. 193.

Colchester a. Lucas, II. 245.

Cole a. Green, I. 407.

Compton a. London, I. 158. 168. 182. 347,
8. 351. 361. 413, 4, 8.

Cookson a. Gray, I. 461.

Cotterel a. Wells, I. 173, 4.

Coventry a. Colt, I. 526.

Cross a. Gay, II. 481.

D.

Da Costa v. Russia Comp. II. 167. 171, 3.

Darby v. Foxley, I. 50.

Davenant v. Hurdiss, I. 334. 394.

Davidson v. Moscrop, I. 177.

Davis v. Humphries, II. 19.

Day v. Savadge, I. 178. 186. 193, 9.
200, 5, 6.

Denning v. Norris, I. 811.

Dighton, I. 650, 3. 766. II. 75. 224.

Dodwell v. Oxford, I. 240. 250. 384. 404.
641.

Doe d. Malden v. Miller, I. 50.

Doggerel v. Pokes, I. 379. 453.

Dorrington v. Edwin, I. 409.

Dublin ca. II. 493.

—— v. Dowgate, II. 269. 270. 312.

—— v. Regem, II. 269. 270.

Dungannon ca. I. 19. 852.

Dutch West India Company v. Moses,
I. 37.

Dummer v. Chippenham, I. 831.

Durham (Mayor of), I. 755. II. 103.
154.

Davis a. Cotton, I. 135.

—— Feltmakers, I. 350. 396, 7.
424, 5.

—— Green, I. 621. 787.

Dennis a. Piper, I. 492. II. 470.

Deering a. Strode, I. 455.

Dickson a. Clack, I. 410.

Dowgate a. Dublin, II. 269. 270. 312.

Drewry a. Weatherhead, I. 779. 789.

Drogheda a. Pippard, I. 18. II. 364.

Durham a. Green, I. 128. 236. 310. 325.
II. 77, 8. 261.

E.

Earle's ca. I. 680. 713.

Eaden's ca. I. 189. 192, 8. 412. 418. 429.

Edward v. Vesey, II. 17.

Enfield v. Hills, II. 276. 285, 8.

Evesham ca. I. 70.

Exeter v. Clarke, I. 349.

—— Glyde, I. 656. 694, 6. II. 228.

—— Starre, I. 428. 597.

Edwin a. Dorrington, I. 409.

Estwick a. Cudden, I. 153. 181. 246, 7.
364, 9. 370, 1. 380.

Evans a. Harrison, I. 252. 440.

Evelyn a. Claridge, I. 504. II. 381.

Eynon a. Bright, II. 481.

F.

Fazakerley v. Baldo, I. 412, 3, 7. 421, 2.

—— Wiltshire, I. 5. 148. 153, 8.
181, 6, 8. 243. 251. 357. 364, 8, 9. 371.
389. 437. 837.

Feltmakers v. Davis, I. 350. 396, 7. 424, 5.

Fernes, I. 138.

Foot v. Prowse, II. 286. 308.

Foxwhist v. Tremaine, I. 49.

Framework Knitters v. Green, I. 154.
319.

Franklin v. Green, I. 249.

Freemantle v. Silk throwsters, I. 333.

Farnham a. Attorney General, I. 36.

Faweett a. Wright, II. 191. 201. 210.

Fell a. Gun makers, I. 429. 447.

Fennel a. Bodwic, I. 143. 182, 4, 6, 7.
350. 371, 4, 8.

Fox a. Bedford, I. 218. 235. 242.

Foxley a. Darby, I. 50.

Francis a. Lord, I. 492. II. 291.

—— Newling, I. 255. 263. 270, 6,
861.

G.

Gabriel v. Clarke, I. 617.

Gay v. Cross, II. 481.

Gerrish v. Rodman, I. 426.

Gibbon, II. 1.

Gilby v. Lockyer, I. 584.
 Grafton ca. I. 163, 5. 305, 6.
 Gray v. Cookson, I. 461.
 Green v. Cole, I. 407.
 ——— Davis, I. 621. 787.
 ——— Durham, I. 128. 236. 310. 325.
 II. 77, 8. 261.
 ——— Pope, II. 268. 282, 6, 7.
 Griffith v. Williams, I. 191.
 Guilford v. Clarke, I. 252. 386. 440. 581.
 Gunmakers v. Fell, I. 429. 447.
 Gibbes a. Windhurst, I. 190.
 Glazby a. Bath, I. 185. 352. 375.
 Gledhill a. Innholders, I. 432, 3.
 Gloucester a. Taylor, I. 638. 666. 698.
 706, 7. II. 136.
 Glyde a. Exeter, I. 656. 694, 6. II. 228.
 Godman a. Harrison, I. 351, 8. 361, 3.
 413.
 Godwin a. Colchester, I. 3. 5. 44. 143.
 169. 211. 353, 5. 365, 6. 371, 2. 383.
 429.
 Gooden a. Smedley, I. 461.
 Gower a. Attorney General, I. 858.
 Gradon a. Britton, I. 49.
 Gray a. Cameron, II. 254. 291.
 Greaves a. Southampton, II. 22, 5.
 Green a. Framework Knitters, I. 154.
 319.
 ——— Franklin, I. 249.
 ——— London, I. 186. 371.
 Gros court a. Robinson, I. 181. 313, 4.
 362, 412, 3.

H.

Haddock's ca. I. 39. 630. 644. 667. 844.
 Hamburgh comp. I. 141. 172.
 Harman v. Tappenden, I. 702. 817.
 Harris v. Wakeman, I. 145. 169. 186.
 398. 798.
 Harrison v. Alexander, I. 417.
 ——— Evans, I. 252. 440.
 ——— Godman, I. 351, 8. 361, 3.
 413.
 ——— Williams, I. 852. II. 23.
 Harscott's ca. I. 453.
 Hartop v. Hoare, I. 200, 1, 6. 412.

Harwood's ca. I. 161.
 Hastings ca. I. 767.
 Hawley's ca. I. 660, 2. II. 97. 227.
 Hazard's ca. I. 612, 13, 15, 16. 678.
 Hereford ca. II. 201.
 Herring v. Finch, I. 819. 822.
 ——— Brown, II. 434.
 Hesketh v. Braddock, I. 145. 178. 182,
 4, 6. 205. 350, 2. 368. 371, 3, 6. 798.
 800.
 Hoblyn v. Regem, I. 128. 233. 255. 262.
 275. II. 488.
 Hodges v. Atkis, II. 25.
 Hodgson v. Atkinson, I. 206.
 Hollingsford v. Hungerford, I. 350.
 Holt I. 706. II. 138.
 Horn v. Chandler, I. 189.
 ——— Ivy, I. 222. 602.
 Horner's v. Barlow, I. 248.
 Hurscott's ca. I. 137.
 Hurst's ca. II. 75.
 Hyde v. Throutout, II. 129.
 Hastings a. Moore, II. 83, 4, 5. 145.
 Hawkins a. Blacquire, I. 200, 5, 6.
 Hearne a. Bosworth, I. 337. 359.
 Herring a. Cambridge, I. 308.
 Hills a. Enfield, II. 276. 285, 8.
 Hoare a. Hartop, I. 200, 1, 6. 412.
 Holmes a. Wigan, II. 260.
 Hudson's Bay Comp. a. Child, I. 231. 328.
 Humphries a. Davis, II. 19.
 Hungerford a. Hollingsford, I. 350.
 Hunt a. Argyle, I. 201.
 Hurdis a. Davenant, I. 334. 394.

I.

Innholders v. Gledhill, I. 432, 3.
 Ipsley v. Turk, I. 811.
 Ipswich Taylors' ca. I. 225. 346. 381. 394,
 5. 869.
 Ipswich Clothworkers, I. 344.
 ——— v. Johnson, I. 8. 44. 147. 192.
 208, 9.
 Idle a. Woolly, I. 143. 184. 352. 368. 371,
 5. 396.
 Ivy a. Horn, I. 222. 602.

J.

- James v. Tutney, I. 436.
Jay's ca. I. 680. 704. 713. 714.
 Jeffs v. Bolton, I. 139. 327. 404. 777.
 Jennings' ca. I. 612, 13.
 Jollie v. Broad, I. 158.
 Jones v. Williams, I. 20. 770, 8. 781, 2, 3.
 II. 79.
 Jackson a. Phips, I. 196.
 James a. Pits, I. 50.
 Jenkins a. Martin, I. 739.
 ——— Player, I. 337, 8. 358.
 Jocam a. Whitwood, II. 163.
 Johnson a. Berwick, I. 182. 211. 219. 228.
 341. 371.
 ——— Ipswich, I. 8. 44. 147. 192. 208,
 209.
 ——— Workingham, I. 382.
 Jones a. Player, I. 153. 359.

K.

- Kerby v. Wichelow, I. 5. 7. 33, 6. 47.
 Kirk v. Nowill, I. 12. 224, 6. 449, 450.
 Knight v. Wells, I. 37, 9. 43. 858. II. 175.
 Kynaston v. Shrewsbury, I. 64, 8. 798.
 II. 259. 270, 1. 280, 4.
 Kingston a. the Protector, I. 190. 710, 12.

L.

- Lamb v. Mills, I. 455.
 ——— Wiseman, I. 814.
 Layton's ca. I. 786.
 Leathley v. Webster, I. 322.
 Lee v. Willis, I. 294. 388, 9. 396. 443, 5.
 Leyfield's ca. I. 24.
 Lidestone v. Exeter, II. 193.
 Limerick v. Attorney General, 831.
 London City's case, I. 143, 4, 5. 150, 8.
 178. 217. 221, 3. 368. 435. 443, 8. 458.
 471. 525. 622. 722. 837. 852.
 London, Chamberlain's ca. I. 182, 6. 246.
 335. 350. 371. 394. 417.
 London v. Bernardiston, I. 331. 368. 376.
 402. 436.

- London v. Coates, I. 164, 5. 193.
 ——— Compton, I. 158. 168. 182. 347.
 8. 351. 361. 413, 14. 18.
 ——— Estwick, II. 75.
 ——— Green, I. 186. 371.
 ——— Lyme Regis, II. 1.
 ——— Markwick, I. 774.
 ——— Vanacre, I. 169, 170. 243. 251.
 299. 301, 2, 4, 7. 335. 365. 434, 9. 588.
 591. 846. 867.
 ——— Wood, I. 186. 350. 376. 401, 5,
 7. 417. 438. 443, 8. 452.
 Lord v. Francis, I. 492. II. 291.
 Lucas v. Colchester, II. 245.
 Lyme Regis ca. I. 42, 4. 50.
 Leeds a. Pees, II. 135, 9.
 Lewes a. Sherborne, I. 44.
 ——— Vaughan, I. 3. 168. 626. 656. II.
 289. 293, 6.
 Lincoln a. Shuttleworth, I. 528. II. 60.
 75. 102. 106. 153.
 Liverpool a. Attorney General, I. 327.
 London a. Swallow, I. 413, 16. 420.
 ——— Wannel, I. 313. 361. II. 78.
 ——— Wood, I. 186. 350. 376. 401, 5,
 7. 417. 438. 443, 8. 452.
 Long a. Manley, I. 610.
 Lowten a. Colchester, I. 327.
 Lyme Regis a. London, II. 1.

M.

- Machell v. Nevinston, I. 77, 8. 80.
 Maidstone ca. II. 432.
 Malsbury ca. I. 46, 8.
 Manaton's ca. II. 175. 186. 201. 280.
 Manley v. Long, I. 610.
 Marriage v. Lawrence, II. 1. 6.
 Martin v. Jenkins, I. 739.
 Mellor v. Spateman, I. 5.
 Middleton's ca. I. 331. 376. 650. 683. II.
 41. 75. 97.
 Mills' ca. II. 317.
 Milward v. Thatcher, I. 617, 19. 623, 4.
 II. 75.
 Mitchell v. Mitcheson, I. 410.
 Moir v. Monday, I. 146. 157. 166, 7. 213.
 a

Moore, II. 1.
 — v. Hastings, II. 83, 4, 5. 145.
 Musgrave v. Nevins, I. 77, 8. 80. II.
 257. 442. 481.
 Maine a. Piddington, I. 202.
 Markwick a. London, I. 774.
 Miller a. Malden, Doe dem. of, I. 50.
 Mills a. Lamb, I. 455.
 Mitcheson a. Mitchell, I. 410.
 Mogg a. Cart, I. 417.
 Monday a. Moir, I. 146. 157. 166, 7. 213.
 Morey a. Butchers, 249, 50. 340.
 Moscrop a. Davidson, I. 177.
 Moses a. Dutch West India Comp. I. 37.

N.

Neville v. Paine, II. 484.
 Newling v. Francis, I. 255. 263. 270, 6.
 861.
 Norris v. Staps, I. 229. 344, 5. 381.
 Norwich ca. II. 292.
 Newel a. Ruding, II. 312.
 Nevins a. Machell, I. 77, 8. 80.
 — Musgrave, I. 77, 8. 80. II.
 257. 442. 481.
 — Stevenson, I. 805.
 — Tufton, I. 735. II. 256. 463.
 Nowill a. Kirk, I. 12. 224, 6. 449, 50.
 Norfolk a. Cragg, I. 24. 723, 4, 5.
 Norris a. Denning, I. 811.
 North a. Potter, I. 610.

O.

Oldknow v. Wainwright, I. 570.
 Owen v. Saunders, I. 586. 605.
 — Stainoe, I. 526.
 Oxford ca. I. 796.
 — v. Wildgoose, I. 386.
 Oakhampton a. Commins, I. 804.
 Osborne a. Austin, I. 524.
 Oxford a. Dodwell, I. 240. 250. 384. 404.
 641.

P.

Palmer v. Barfoot, I. 159. 171.

Papilion and Dubois, II. 140.
 Parker's ca. II. 75.
 Parry v. Berry, I. 128. 235. 343.
 Partridge's ca. II. 442.
 Peat's ca. II. 143.
 Pees v. Leeds, II. 135, 9.
 Penryn, II. 103.
 Pepys' ca. 650.
 Phillips v. Bury, I. 513.
 — Smith, II. 503.
 Phips v. Jackson, I. 196.
 Physicians v. Salmon, I. 37.
 Piddington v. Main, I. 202.
 Pierce v. Bartrum, I. 244, 6, 7, 8, 9. 336.
 Pierson v. Ridley, I. 157.
 Piper v. Dennis, I. 492. II. 470.
 Pippard v. Drogheda, I. 18. II. 364.
 Pits v. James, I. 50.
 Player v. Archer, I. 189. 331. 373, 6. 380.
 402, 7. 450. 775.
 — Jenkins, I. 337, 8. 358.
 — Jones, I. 153. 359.
 — Vere, I. 186. 326. 358. 387. 839.
 Plumer v. Benthams, I. 200.
 Pope v. Vaux, I. 417.
 Potter v. North, I. 610.
 Powell v. Price, II. 176. 193.
 — Regem, I. 317. 849.
 Prigge v. Adams, I. 247.
 Protector v. Kingston, I. 190. 710. 712.
 Prowse v. Foote, I. 758, 9. 760.
 Pullen v. Palmer, II. 294.
 Paine a. Neville, II. 484.
 Palmer a. Buckley, II. 306, 9.
 — Buller, I. 239. 861. 877.
 — Pullen, II. 294,
 Parkhouse v. Smith, d. Dormer, II. 481.
 Passey a. Vintners, I. 284. 298. 300. 319.
 382. 434, 9. 767.
 Pelson a. Barber Surgeons, I. 300. 396.
 425.
 Perryman a. Tredymmock, I. 180.
 Phillips a. Bateman, II. 22.
 Pilkington a. Rich, II. 280, 8, 9, 90.
 Plasterers and Bricklayers, I. 360.
 Pokes a. Doggerill, I. 379. 453.
 Pope a. Green, II. 268. 282, 6, 7.

Powell a. Crawford, I. 736, 7. II. 86. 113.
295.

Price a. Powell, II. 176. 193.

Prowse a. Foot, II. 286. 308.

R.

Ravenshill ca. II. 76.

R. v. Abell, I. 845.

Aberystwith, II. 58.

Abingdon, I. 430. II. 48. 60. 131, 2,
7, 8, 9. 176, 9. 204. 212. 223. 299.
301. 323.

Albans, St. II. 79.

Aldborough, I. 581. II. 246.

Amery, I. 6, 7. 16. 20, 3, 6, 8. 30,
1, 2, 3. 490. 633. 870, 5. II. 30. 308.
479, 480, 8. 497. 509.

Amos, I. 773.

Andover, I. 652, 4. 665. 713. II. 142.
151. 287.

Armstrong, II. 503.

Ashwell, I. 237. 255. 264. 271, 8. 285.

Askew, I. 27. 391. 470, 8. 480.

Atkyns, I. 69. 94. 755. 769. 778. 823.

Autridge, II. 443.

Azbridge, II. 97. 100. 303.

Babb, II. 15. 17. 22, 8. 352.

Banks, II. 57, 8. 66. 116. 263.

Barber Surgeons, I. 292. 313. 841.
850.

Barker, II. 41. 87.

Baron, II. 300.

Barzey, I. 34. II. 375. 501.

Bedell, II. 14.

Bedford, I. 571. 588. 606. 768. 811.

II. 54, 7. 71, 2. 102. 339. 346. 427.

Bell, II. 24, 8. 481.

Bellringer, I. 115, 17. 125, 7.

Bennett, II. 481.

Bernard, I. 590.

Bettesworth, II. 150. 171, 3.

Biddle, II. 439. 490.

Bingham, II. 343.

Binsted, II. 371. 409.

Birch, II. 453, 4. 503.

R. v. Bird, I. 255, 7. 272, 9. 286, 8. 459.
471, 2, 3, 7.

Blagden, II. 441.

Blatchford, II. 504.

Blunt, II. 481.

Bond, II. 379. 414, 19. 423.

Boston, I. 448.

Bosworth, I. 107. 479. 575, 6.

Bower, I. 117, 18. 125. 133. 298. 587.

Boyles, II. 343. 463.

Bray, I. 802, 3.

Breton, I. 286. 471. II. 348, 9. 350, 1.

Bridgewater, I. 862. II. 153.

Bristol, I. 627. II. 147. 190. 217.

Brooke, II. 516.

Brown, I. 738. II. 72, 3. 386. 402.
470.

Buller, I. 103, 4. II. 355.

Butler, II. 391.

Cambridge, I. 26. 459. 465. 503. 650.
727. 773. II. 45. 55, 7, 8. 112. 133.

190, 91, 2, 6. 232, 5. 249. 302.

Campion, I. 631. II. 75. 104. 231.
303, 5.

Canterbury, I. 21. 650. 703. II. 41. 75.
244.

Carlisle, I. 77. 83. 632, 3. 641. II.
239, 40.

Carmarthen, I. 60. II. 340. 360. 488.

Carpenter, I. 801. II. 498. 520.

Carter, I. 95. 505. II. 381. 395.

Castle, I. 266. 289. 517. 813.

Chalke, I. 610, 11, 12. 637. 643, 6.
663, 4. 679. 685. 764. 792. II. 238.
242.

Chalice, II. 193. 288. 293.

Chester, I. 23. 603. 651. II. 15. 22.
36. 44. 142. 201. 243. 264. 432.

Chichester, II. 277.

Clapham, I. 608. II. 79. 185. 208, 9.

Clarke, II. 335. 379. 408. 416. 489.
520.

Clerke, I. 432. 726. 795.

Glithero, II. 175. 274.

Colchester, II. 87.

Cornwall, II. 201.

- R. v. Corry, I. 94, 6. 105.
 Coventry, I. 651, 2. II. 181, 5. 227.
 Cracker, II. 494.
 Cripland, I. 828.
 Courtney, I. 503, 5. 570, 71. II. 381.
 488, 9.
 Croke, I. 38.
 Cudlipp, II. 413, 14, 15. 422.
 Cusack, II. 336. 488.
 Cutbush, I. 261, 8. 274.
 Cutlers, II. 108.
- Dartmouth, I. 472.
 Davie, I. 826. 830.
 Davies, II. 365.
 Davis, I. 834.
 Dawes, I. 97. 730.
 Deane, II. 41.
 Debenham, II. 1. 6.
 Denison, I. 595.
 Derby, I. 640, 1, 3, 4, 6, 7. 667, 8.
 II. 152.
 Devizes, II. 148.
 Devonshire, I. 115, 19.
 Dicken, I. 749. II. 421.
 Doncaster, I. 62. 629. 634, 5, 7. 655.
 663, 9. 673. 710. 716. 758. II. 223,
 26. 241.
 Dover, II. 160.
 Downes, I. 722. II. 512.
 Dublin, I. 150. 220, 21. 309. 424. 726.
 II. 41. 113. 128. 159. 269. 488.
 Dummer, I. 826.
 Durham, I. 6. 766.
- Edgar, II. 429.
 Edyevean, II. 326.
 Ellames, II. 273. 481. 503.
 Ely, II. 36. 44, 8.
 England (Bank of), II. 40.
 Esham, II. 328.
 Everet, II. 40, 6.
 Evesham, II. 61.
 Excise (Commissioners), II. 35.
 Exeter, I. 612. 677. 696. II. 161. 237.
 Eye, I. 467, 8. 390.
- R. v. Faversham, I. 64, 5. 329. 387, 9.
 629. 695. 702. II. 232. 240, 41.
 Filewood, II. 516.
 Foster, II. 426.
 Fowey, I. 56. II. 47. 50. 162. 314.
 320. 325.
 Foxcroft, II. 525.
 Francis, II. 481.
- Gaborian, I. 69. 77, 8. 94. 103, 4, 5.
 Gaskins, II. 235, 8.
 Ginever, I. 134. 277. 287. 297. II.
 437, 8. 468.
 Glamorgan, I. 405. II. 267.
 Gloucester, II. 135, 8.
 Glyde, II. 237.
 Godwin, I. 617. 620.
 Gordon, II. 7. 385.
 Grampound, II. 47. 273, 9.
 Grant, II. 412.
 Gravesend, I. 608. 780. II. 79.
 Green, I. 833.
 Grey, I. 773. 861. 872.
 Griffith, II. 303.
 Grimes, I. 67. 120. 696. II. 474. 504.
 Grosvenor, I. 265. 305. 442. 594.
 299. 517. 869. II. 488.
 Guilford, I. 715. II. 75. 82. 101.
 Guise, II. 206.
 Gwyn, II. 5.
- Halford, I. 648. II. 157.
 Hall, II. 361. 510.
 Hare, II. 38.
 Harper, I. 495. 572, 3, 4.
 Harris, II. 90.
 Harrison, I. 313. 361, 3. 413. II. 78.
 121.
 Hart, II. 420.
 Harvey, II. 341.
 Harwood, II. 201. 355. 367, 8.
 Haslemere, II. 61, 7, 9.
 Hawkins, I. 508. 745. II. 86.
 Hawley, II. 227.
 Haythorne, I. 11. 216. 227. 292. 500.
 794. 861, 6. II. 41. 454.

- R. v. Head**, I. 128. 233, 5. 255. 262, 9. 275.
Hearle, I. 523. 755, 6. II. 103. 269.
 487, 8, 9.
Heath, I. 480, 2.
Heaven, II. 93. 396.
Hebden, I. 97. 101. 727. 730. II. 442.
 472, 4. 483.
Helstone, II. 372.
Hereford, I. 456, 7. 472. II. 131, 9.
 181.
Hertford, II. 337. 348. 430. 487, 8.
 516.
Heydon, II. 26. 68.
Higgins, I. 799.
Highmore, II. 345.
Hill, I. 59. 61, 2, 4, 9. 70, 2, 4, 8. 115.
 II. 378. 455. 471.
Hoare I. 289.
Hodge, II. 403.
Holland, I. 255. 277. 861. II. 457, 9.
Hollister, II. 28.
Holmes, II. 172. 193, 5.
Holt, II. 439.
Hoskins, II. 176. 323.
Howell, II. 516.
Hoyte, I. 122, 4. II. 520.
Hughes, I. 53. 729. II. 31, 3. 474, 5,
 7, 8.
Hull, II. 200. 489.
Hulston, II. 343.
Hungerford, I. 593.

Ilchester, II. 181, 5. 302.
Ingram, I. 682. II. 12.
Ipswich, I. 39. 45. 96. 135. 169. 638.
 658. 661. 682, 8. 693, 4, 5. 701, 7.
 810. II. 9. 10. 113. 131. 141. 184.
 231. 305. 313, 5, 6.
John II. 33.
Johns (St.) II. 92. 117. 193.
Jones, II. 440. 481.
Joliffe, I. 156. 210.
Jotham, I. 725, 6. II. 42, 4. 91. 109.

Kingston, II. 130. 141, 2. 151. 163,
 4, 5. 265.
Knight, I. 188. 630. 764. 792, 3. II.
 469.

R. v. Lambert, II. 201. 246.
Lancaster, II. 298.
Lane, I. 612, 13. 646, 7. 680. 713.
 II. 220. 374.
Langley, I. 769. 778.
Larwood, I. 440. 515. 596. 841, 2,
 3, 8.
Latham, II. 383. 390. 469.
Lathrop, I. 115. II. 383. 390, 2.
 469.
Lawrence, II. 446.
Leicester, I. 672. 697.
Leigh, II. 442. 482, 6. 506. 512.
Lenthal, I. 605.
Lewis, II. 520.
Leyland, I. 439. II. 71, 2, 3.
Lincoln, I. 479.
Lisle, I. 64. 101. 726. 812. II. 175.
 461.
Liverpool, I. 62, 4. 75. 639. 640, 6.
 681. 692, 4. II. 49. 116, 19. 142.
 151. 180. 223. 233.
Locke, I. 127.
London, I. 176. 448. 454. 499. 607.
 685. 713, 5. 801. 839. 852, 9. II.
 36, 9. 89. 97. 101, 7. 124.
Love, I. 507.
Lucas, II. 16. 111.
Ludlam, II. 78.
Ludlow, I. 361. II. 214.
Lyme Regis, I. 424. 629. 655. 669.
 696, 9. 710. II. 179. 185, 7, 8. 202.
 230. 248. 278. 281. 452.
Lynne (King's), II. 183. 235.

Maidstone, I. 229. 253, 5.
Malden, I. 496. 572. II. 182. 203.
Mallet, I. 488.
March, I. 576.
Margate, II. 41, 3. 164, 5.
Marriott, II. 178.
Marsden, II. 361.
Marshall, I. 311. 459. 465. 618. II.
 410.
Martins (St.) II. 49, 50.
Mary's (St.) II. 479.
Maurice, I. 479.

- R. v. May, I. 64. 70, 6. 88.
 Mears, II. 59.
 Medlicot, II. 343.
 Mein, I. 729. II. 345. 363. 378, 9. 474.
 Merchant Tailors, I. 163. 448. II. 72. 149.
 M'Kay, II. 59. 345. 363. 510.
 Middlesex, II. 126.
 Miles, I. 669. 670.
 Miller, I. 11. 115. 133. 216. 227. 292. 441. 518. 841. 850, 6. 861.
 Mitchell, I. 487.
 Monday, I. 125, 7. 133. 481. 508, 735, 6, 7, 8. 745. 811. II. 86. 113. 523.
 Monmouth, II. 197.
 Montacute, II. 141. 287.
 Morgan, I. 111. 530. II. 198. 397. 516.
 Morris, I. 115, 17. 576. 856. II. 155. 407.
 Mortlock, II. 418. 520.
 Mothersell, II. 2, 3, 4, 13.

 Nance, I. 129. 130. 496. 511. 572. II. 482.
 Netherthong, I. 806.
 Newcastle, I. 181. 316. 321, 4. 394. 430. 465. II. 15. 16. 22. 110. 143. 6. 254. 291. 327.
 Newdigate, I. 451.
 Newland, II. 443.
 Newling, II. 83.
 Newsham, II. 57, 8. 67. 137.
 Nicholas (St.) I. 460.
 Norris, I. 104.
 Norwich, I. 726. II. 131, 9. 163. 176. 191, 2. 302.
 Nottingham, [II. 11. 27, 8. 128. 148. 156, 7. 166.

 Osborne, I. 521. 861. II. 380.
 Owen, II. 41. 113. 158.
 Oxford, I. 66. 582. 634. 680. 710. 713. II. 53. 70. 205. 231. 254. 291. 305.
- R. v. Paine, II. 359. 411.
 Parkyns, I. 84, 5. 829.
 Parry, I. 508. 745. II. 86.
 Pasemore, I. 3. 16. 25. 30. 480. 853, 6. 860, 4, 5, 8. 870, 1, 3, 4. II. 488.
 Pateman, I. 617, 9. 620, 3. 703. II. 394.
 Peacock, I. 510. 749. II. 414. 520.
 Penrice, II. 208.
 Penryn, II. 400. 474.
 Pettward, II. 298.
 Phillips, I. 851. II. 463. 503, 5, 6.
 Pickerill, II. 513.
 Pigram, II. 8.
 Pindar, II. 489.
 Plymouth, II. 133.
 Plympton, I. 828.
 Pomfret, I. 676. II. 192.
 Ponsonby, I. 625, 9. II. 93, 5. 354. 396, 9.
 Pool, II. 382.
 Portsmouth, I. 657. 696. II. 93.
 Powell, I. 475. II. 359. 443, 4. 520.
 President des Marches, I. 608. II. 81. 99. 185.
 Pugh, I. 795.
 Purnell, II. 26.
 Purshouse, II. 355.
 Pyke, II. 474.

 Radnor (New) II. 359.
 Ragsden, II. 347.
 Reeks, II. 489.
 Richardson, I. 122. 629. 634, 9. 640, 6. 674. 692. 710. II. 361, 2. 445. 510.
 Richmond, I. 486. II. 383.
 Rippon, I. 610, 11, 12, 13. II. 219. 276. 288. 290.
 Robins, I. 802.
 Robinson, II. 323.
 Rogers, I. 155. 160. 175. 400, 1. 715.
 Routledge, I. 795.
 Rowe, I. 462.
 Rowland, II. 456.
 Rye, II. 8. 123. 329.

R. v. Sadler, I. 634.
 Sainsbury, I. 773.
 Salop, II. 318, 19.
 Sandys, I. 698. II. 389.
 Sargeant, I. 484. II. 367, 9.
 Saunders, I. 858. 869. II. 338, 9.
 362.
 Scarborough, II. 53, 6, 8, 69.
 Scolden, I. 485, 9. II. 373.
 Scott, I. 113. 498. II. 358. 395.
 Serle, II. 200. 489.
 Severn and Wye, II. 41.
 Shakespeare, I. 49.
 Sharples, I. 212.
 Shelley, II. 15. 21. 2. 8. 9. 111. 352.
 Shrewsbury, I. 64, 7, 8. 74. 696. II.
 14. 229. 233, 4.
 Slatford, I. 582. II. 205. 305.
 Smart, I. 96, 9. 100, 2.
 Smith, I. 97, 9. 121. 502. 527. 721, 9.
 II. 131, 2, 3, 5, 7, 9. 164. 386.
 406. 451, 8. 460. 472, 3, 4.
 Soley, I. 823, 4.
 Sparrow, I. 520. 832.
 Spearing, I. 97. II. 472.
 Spencer, I. 261, 8. 273. 294. 315.
 387. II. 524.
 Spotland, II. 298.
 Stacey, I. 97. II. 28. 378, 9. 412,
 413, 16.
 Stafford, II. 44. 260. 275.
 Sterling, II. 179.
 Stevens, II. 186.
 Stokes, I. 738. 748, 9. 750, 1. II.
 399.
 Suddis, II. 189.
 Surgeons, I. 312. II. 298. 301.
 Surry, II. 27, 8.
 Symmons, II. 371. 422. 502.

 Tappenden, I. 294. 315, 16. 465. II.
 304.
 Tate, II. 355.
 Taunton, I. 703.
 Taylor, I. 512. 666. 687. II. 200.
 490.

R. v. Thame, I. 218. 650. 703. II. 224.
 244.
 Thatcher, I. 582. II. 87.
 Theodrick, I. 62, 4. 74, 7, 8, 9, 80,
 2, 3.
 Thetford, I. 520. II. 3. 56. 370.
 Thornton, I. 56. 96, 8, 9, 100, 2.
 115. 756. 763. 790.
 Tidderley, I. 615, 6. II. 75. 104.
 221.
 Tintagel, II. 58
 Tiverton, I. 668. 827.
 Tomlyn, I. 255. 266. 427. 441. 517.
 Tooly, II. 325.
 Totness, II. 93.
 Tower, II. 15. 111.
 Tregony, II. 45. 134. 163. 196.
 Trelawny, I. 622. II. 331, 9.
 Trevanion, II. 15, 22, 9. 352.
 Trevenen, II. 335. 379. 398. 404, 5.
 413, 17, 19.
 Trew, I. 94. II. 376, 7. 393.
 Trinity House, I. 22. II. 331. 430.
 441. 498.
 Truboy, I. 655, 7. 696.
 Truro, II. 57. 68.
 Tucker, I. 74, 7. 266. 517. II. 30.
 384, 8.
 Turkey Comp. I. 479.
 Turner, II. 87.
 Twitty, II. 206.

 Varlo, I. 125, 7. 133. 518.
 Vaughan, I. 826.
 Vicars, I. 690.

 Wake, I. 79.
 Wallis, II. 363. 510.
 Ward, II. 41. 79. 150. 164. 201.
 213.
 Wardroper, II. 520.
 Warlow, II. 359. 426.
 Water Eaton, II. 115. 129. 130. 142.
 151. 165. 274.
 Waterworks (Governors of) II. 97.
 Watson, I. 825. 831.

Seaber a. Colchester, I. 3. 39. 41. 55.
856, 9. 870.
Searl a. Wood, I. 356. 367, 8. 444, 8.
455.
Sharpe a. Wright, II. 310, 11, 12.
Shrewsbury a. Kynaston, I. 64, 8. 798.
II. 259, 270, 1. 280, 4.
Silk throwsters a. Freemantle, I. 333.
Smart a. Chaunt, II. 324.
Smith a. Carsey, II. 114.
——— Phillips, II. 503.
Spateman a. Mellor, I. 5.
Stainoe a. Owen, I. 526.
Staps a. Norris, I. 229. 314, 15. 381.
Starre a. Exon, I. 428. 597.
Succlen a. Russel, II. 254. 291.

T.

Tanistry ca. I. 181.
Taverner's ca. I. 319. 684. II. 75. 211.
Taylor's ca. II. 75.
——— v. Gloucester, I. 638. 666. 698.
706, 7. II. 136.
Thetford ca. II. 193.
Tooker v. Beanfort, I. 24.
Townsend's ca. I. 463, 4. II. 75.
Tredymmock v. Perryman, I. 180.
Tufton and Ashley's ca. II. 508.
Tufton v. Nevinson, I. 735. II. 256. 463.
Turner's ca. II. 280.
Tappenden a. Harman, I. 702. 817.
Tenant a. Spink, I. 195. 412.
Thatcher a. Milward, I. 617, 19. 623, 4.
II. 75.
Throgmorton a. Bolton, I. 159. 168. 171.
348.
Tremaine a. Foxwhist, I. 49.
Trinity College a. Canterbury, II. 112.
174.
——— House a. Attorney General, II.
503.
Tucker a. Clarke, I. 387, 8. 443, 5. 450.
Turk a. Ipsley, I. 811.
Turner a. Starling, I. 820.
Tutney a. James, I. 436.

V.

Vaughan v. Lewis, I. 3. 168. 626. 656. II.
289. 293, 6.
Verior v. Sandwich, I. 614, 17, 19. II.
222.
Vintners v. Clarke, I. 152. 163. 412, 15.
——— Passey, I. 284. 298. 300. 319.
382. 434, 9. 767.
Virginia comp. ca. II. 488.
Vere a. Player, I. 186. 326. 358. 387. 839.
Vanacre a. London, I. 169, 170. 243. 251.
299. 301, 2, 4, 7. 335. 365. 434, 9. 538.
591. 846. 867.
Vaux a. Pope, I. 417.
Vesey a. Edwards, II. 17.

W.

Wannel v. London, I. 313. 361. II. 78.
Ward v. Brampton, II. 287.
Warden v. Rous, I. 522.
Warren's ca. 651, 3.
Watson v. Clarke, I. 207. 411, 12, 17,
19.
Weatherhead v. Drewry, I. 779. 789.
Weavers v. Brown, I. 148, 9. 184.
Wells v. Cotterell, I. 173, 4.
Whittacer's ca. I. 40.
Whitton v. Westran, I. 858.
Whitton v. Jocam, II. 163.
Widdrington's ca. II. 194. 277.
Wigan v. Holmes, II. 260.
Williams v. Braddock, I. 178.
Williamson v. Bolton, I. 162.
Wilton v. Wilks, I. 141, 8. 183, 9. 242. 375.
Winchelsea ca. I. 318.
Windhurst v. Gibbs, I. 190.
Windsor v. Webb, I. 858.
Wood v. London, I. 371. 399. 400.
——— Searl, I. 356. 367, 8. 444, 8. 455.
Woolley v. Idle, I. 143. 184. 352. 368.
371, 5. 396.
Workingham v. Johnson, I. 382.
Wright v. Fawcett, II. 191. 201. 210.
——— Sharpe, II. 310, 11, 12.

Wakeman a. Harris, I. 145. 169. 186. 398.
798.

Wainwright a. Oldknow, I. 570.

Webb a. Beard, I. 417.

——— Windsor, I. 858.

Webster a. Leathley, I. 322.

——— Nevesley, I. 322.

Wellbank a. York, I. 141, 5. 182, 6. 375.

Wells a. Knight, I. 37, 9. 43. 858. II.
175.

White a. Ashby, I. 819, 20.

Wichelow a. Kerby, I. 5. 7. 33, 6. 47.

Wildgoose a. Oxford, I. 386.

Wilks a. Wilton, I. 141, 8. 183, 9. 242.
375.

Williams a. Griffiths, I. 191.

——— Harrison, I. 852. II. 23.

——— Jones, I. 20. 770, 8. 781, 2, 3.

Wiltshire a. Fazacherley, I. 5. 148. 153, 8.
181, 6, 8. 243. 251. 357. 364, 8, 9. 371.
389. 437-837.

Winstanley a. Bates, I. 773.

Wiseman a. Lamb, I. 814.

Wish a. Chapman, I. 641.

Y.

York v. Wellbank, I. 141, 5. 182, 6. 375.

——— Custom of, I. 158. 167, 8. 188.

York a. Cambridge, I. 38.

TABLE OF STATUTES.

Magna Charta, c. 9.	I. 835.
6 Ed. I. c. 1.	II. 297. 331.
18 Ed. I. sts. 2, 3.	II. 331.
1 Ed. III. c. 2. s. 9.	I. 836.
7 R. II. c. 35.	I. 839.
8 Hen. VI. c. 9. s. 6.	I. 785.
c. 26.	I. 784.
1 Ed. IV. c. 20.	I. 136.
19 Hen. VII. c. 7.	I. 330. 392.
22 Hen. VIII. c. 4.	I. 320.
27 24. s. 6.	I. 782.
28 4.	I. 323.
5.	I. 578.
32 30.	II. 272.
33 27.	I. 136.
13 Eliz. 29.	I. 840.
18 14.	II. 272.
37 c. 5.	II. 272.
4 Jac. I. c. 3.	II. 297.
21 13.	II. 272.
13 Car. II. st. 2. c. 1. s. 1.	II. 205.
10.	I. 580.
12.	I. 506. 579.
16 & 17 c. 28.	II. 272.

2 W. M. st. 1. c. 8.	I. 839.
4 & 5 W. M. c. 18. s. 7.	II. 465.
2.	II. 514.
6.	II. 515.
7 & 8 W. III. c. 34.	I. 479.
4 Ann. c. 16.	II. 272.
9 20. s. 1.	II. 168.
s. 2.	II. 248. 252, 3, 8.
s. 3.	II. 283.
s. 4.	II. 353. 425, 8. 436. 466.
s. 5.	II. 485. 511. 517.
s. 6.	II. 169. 435.
s. 7.	II. 272.
s. 8.	I. 113. 497. II. 358. 385.
1 Geo. 1. st. 2. c. 6.	I. 479.
13. s. 4.	I. 479. 481.
5 4. s. 2.	I. 501. 816.
6. s. 3.	I. 508. 579. 734. II. 197.
8 6.	I. 479.
11 4. s. 1.	I. 108. 853.
2.	I. 71. 109. II. 52.
3.	I. 71. 132. II. 62.
4.	I. 791. 854.
5.	I. 131.
6.	I. 114. II. 198.
7.	I. 854.
8.	I. 855.
9.	II. 170.
9 Geo. II. c. 26.	I. 741.
12 13.	I. 479.
13 18. s. 7.	I. 788.
16 30.	I. 741.
22 46. s. 36.	I. 479.
24 23. s. 1.	I. 86.
3 Geo. III. c. 15. s. 3.	I. 585.
4.	II. 20.
6.	I. 585.
12 c. 21.	I. 479.
s. 1.	II. 262.
32 Geo. III. c. 58. s. 1.	I. 747. II. 197. 445. 518.

TABLE OF STATUTES.

xxix

32 Geo. III. c. 58. s. 2.....	I. 752. II. 467. 519.
3.....	I. 754. II, 472.
4.....	II. 18.
38 1.....	II. 255.
43 c. 46. s. 5.....	II. 267.
6 or 7 Geo. IV. c. 3. s. 1.	I. 508. 741.
4.	I. 742.
6.	I. 583.
7.	I. 743.



HISTORICAL SKETCH

OF

MUNICIPALITIES.



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MUNICIPALITIES.

THE institution of Municipal Corporations is said by Dr. Robertson to have conduced more than any other circumstance to the emancipation of Europe from the thralldom of the feudal system. That it did conduce much to this great event cannot be denied, but the germs of liberty had long been sown, and they had already made some growth, when municipalities were incorporated.

Their establishment was the effect of that spirit of liberty which had gone abroad, and a considerable degree of power and independence already existing in the cities and towns to which charters were granted. They were already become influential and wealthy associations. Their traffic not only brought them riches, but gave them a maritime power not inconsiderable in those times. Their increasing wealth and commerce established among them the burgher watch and ward, and voluntary associations for the protection of property, not efficient at all times against the rapacity of marauding barons,

but capable of repelling those bands of outlaws and disciplined robbers with whose predatory excursions the annals of European history are frequently stained. The dangers to which their property was exposed taught them the necessity, and they soon learnt the power of union. While the barons were wasting their revenues and retainers in wild wars, and weakening each other with mutual conflicts, the towns were gradually and silently accumulating wealth, population and power. At a very early period of our history they were defended by walls. With Italian merchandize they imported the institutes of Venice and Genoa; and commerce with the Hanse towns, then also in their infancy, introduced a similarity of internal arrangement. The grants of privileges contained in the charters were in fact confirmations of privileges already existing. This sanction gave confidence and firmness to the municipalities, with little loss or concession of the lords. It requires no historical document to convince us; that had they not been already powerful, they would not have been equally favored by the barons and princes, each desiring the assistance of allies in the struggle between prerogative and privilege. The statesmen of those times had little idea of calling new powers into existence; the utmost extent of their policy was to avail themselves of those which they found at hand.

Some towns having attained this power, and given great importance to the princes or barons within whose territories they were established, operated as a strong inducement with other nobles for encouraging similar institutions. The walled towns became gradually more formidable than the royal or baronial castles, until the latter altogether disappeared among the martial nations of Europe.

While the royal or baronial banner was followed only by its feudal retainers, who owed but a temporary and rendered but an unready attendance, the towns, defended by

walls and garrisoned by the burghers, assumed a far more formidable attitude than they could have ever presented under a more regular and permanent military establishment; till at length little remained to the lord besides a titular superiority and an inconsiderable tribute, rendered to secure his countenance in the council and the field.

In England many towns were enfranchised and incorporated by the greater barons, and many more by the crown. It appears that at first the right of doing so was in the immediate lord, and not in the king by virtue of his prerogative, for the earliest incorporations by the kings of England were of towns held in demesne or by tenure in capite, and that every great baron who had towns within his barony incorporated them at will. The earls of Cornwall incorporated many towns: West Looe, Truro, Launceston, Liskeard, Bodmin, Lostwithiel, Grampound, and others, with franchises similar to those bestowed by the crown; the baron of Villa Torta constituted Saltash a corporation; the earl of Devon incorporated Plympton; John earl of Moreton and Lancaster (afterwards king) incorporated Bristol and Lancaster; and John duke of Britain and lord of Richmond bestowed on Richmond a charter of incorporation and privileges.*

It does not indeed appear that any regular municipal corporations, with exclusive jurisdiction†, existed among

* Brady on Boroughs, 45.

† Merchant guilds certainly did exist before the Conquest, of which one or two instances may be sufficient proof; and these were doubtless the earlier models of corporations, although perhaps not acknowledged to possess municipal and exclusive jurisdiction.

Gildan is a Saxon word, and signifies to pay; that is, that all of such fraternity shall be subject to pay scot and lot. 8 Co. 125.

We find that services were rendered by some towns, as Associations, acknowledged by the law, and necessarily invested with the power of arranging their internal concerns.

Burgenses de Walingford faciebant servitium Regis cum equis

the Anglo-Saxons. But the division of their judicature into townships and hundreds, under the authority of a class of officers distinct from the nobility, together with the comparative importance to which some towns had arisen, what time the feudal dominion was first imposed, conduced greatly to the early and general establishment of them throughout this nation. The commercial disposition of the Anglo-Saxons, who still composed the bulk of the people, tended to advance the importance of their towns more rapidly than that of towns established in nations of a more military character.

The municipal incorporation of St. Riquier by Louis the Sixth, in France*, so frequently referred to as the earliest

vel per aquam usque ad Blidberiam. Reddinges' Sudton' Besentone et hoc facientibus dabat proposit' mercedem non de censu regis sed de suo. Modo sunt in ipso burgo consuetudines ut ante fuerunt. Domes. f. 56. a. 2.

Dovere, T. R. E.—Burgenses dederunt 20 naves (regi) una vice in anno ad 15 dies et in unaquaque nave erant homines 21. Hoc faciebant pro eo quod eis perdonaverat sacam et socam. Quando missatici regis veniebant ibi dabant pro caballo transducendo 3 denarios in hieme et 2 in estate. Burgenses unum inveniebant stiremanum et unum alium adiutorem et si plus opus erat de pecunia ej: conducebat. Domes. f. 1. a. 1.

In civitate Cantuaria sunt 212 burgenses super quos habet rex sacam et socam et molend' reddt' 108 sol' theoloneu' redd' 68 sol'. Ipsi quoque burgenses habebant de rege 33 acras terræ in gildam suam. Domes. f. 2. a. 1.

Exonia civitas non geldabat nisi quando—Anglia' London' et Eborac' et Winton' geldab' et hoc erat dimid' marca argenti ad opus milit'. Quando expeditio ibat per terram aut per mare serviebat hæc civitas quantum 5 hidæ terræ. Burgenses Exon' urbis habent extra civitatem tra' 12 caruc' quæ nullam consuetudinem redd' nisi ad ipsam civitatem. Domes. 100. a. 1.

Dovere—quicumque manens in villa assiduus reddebat regi consuetudinem quietus erat de theoloneo per totam Angliam. Domes. 1. a. 1.

* I introduce the following extract from Boulainvillier's Letters on the Parliaments of France, as not only giving a short view of the establishment of these communities on the Continent, but tending greatly to support my opinion as to the origin of the exclusive right to

on record, shows only that there were so many important towns so well constituted and established, that the French

incorporate, claimed by the Crown, applicable as well to this country as to France : —

“ L'on commença sous le règne de Louis le Gros à affranchir les grosses villes, c'est à dire à accorder à leurs habitans en general des chartres de liberté et des coùtumes accompagnées de la remise du droit d'imposer des tailles à volonté de celui de la morte taille par où l'on consentoit que les enfans succedassent à leurs pères en heritages et en meubles ; et enfin de la remise du droit de suite, qui paroissoit le plus important en ce qu'il mettoit les hommes en liberté de choisir un autre domicile. On ne sauroit bien dire par qui commença cette grande liberalité : toutefois le plus ancien titre qui en reste est celui de la loi de Vervins, que les auteurs attribuent à Thomas premier sire de Coucis et de Vervins sous le regne de Henri I. et que l'on peut rapporter par conséquent au milieu de l'onzieme siècle. Cette loi qui fut adoptée par Baudouin de Lille Comte de Flanders et par lui donnée à quantité de lieux qu'il affranchit, fut aussi par lui remise à la garde des habitans de la Bassée, pour y avoir recours en cas de besoin. Les comptes de Hainaut, les seigneurs de Liege, d'Avesnes, de Lille, de Douay, les comptes de Rhetelois, les princes ou seigneurs de Poix la donnerent pareillement à leurs sujets. La chartre et la coùtume de Louis vint ensuite et paroît être la première accordée par nos rois, si toutefois l'on peut compter avec certitude sur un passage du continuateur d'Emond, qui dit, en parlant de l'abandon ou delaissement fait de la seigneurie du Gatinois au roi Philippe I. par Foulques Rechîn compte d'Anjou, que ce prince en jura les coùtumes ; les barons ne l'ayant voulu reconnoître qu'à cette condition. Cette loi s'est pareillement fort étendue par imitation, ayant passé d'un coté, jusqu'en Picardie, de l'autre jusqu'à Chaumont en Bassigny et bien avant dans le Berry. La liberté des villes de Beauvais et de Soissons, a été accordée par Louis le Jeune en l'année 1144 et confirmée par Philippe Auguste son fils sous les coùtumes différentes ; celle d'Orleans est de même roi Louis le Jeune et de l'an 1147. Celle de la ville de Meaux de l'an 1149 accordée par Henri compte de Champagne, celle de Dijon de l'an 1187 accordée par Hugues III. duc de Bourgogne ; celle de la ville et comté de Blois de l'an 1195 accordée par le compte Thibaut Sénéchal de France ; celle de la ville de Troyes accordée en 1230 par Thibaut quatrième compte de Champagne et enfin celle de Fauxbourg S. Germain de la Ville de Paris accordée en 1250 par Frère Thomas de Mauleon Abbé de S. Germain pour la somme de 2000 l. seulement.

“ Je ne passerai pas à un grand détail, ce que j'ai dit cy devant suffit pour la preuve du fait. Mais il est necessaire de savoir que

monarchs, by calling them to their assistance, could soon humble the mightiness of their nobility,³ the most powerful and turbulent of any feudal nation. This implies not the infancy of such institutions, but their having advanced to great power, although without any direct legal sanction.

To the early importance of towns and their almost exclusive possession of commerce, with the assumed authority of establishing rules for their own⁴ government, anterior to charters of freedom, is to be assigned the origin of those customs, which we call customs against common right.*

les peuples n'eurent pas plutôt commencé à goûter la liberté que le désordre, la hardiesse, et l'insolence les souleva en une infinité d'endroits contre leurs seigneurs. Les habitans de Vezelay, soutenus par le comte de Nevers, dressèrent eux mêmes une loi de commune et prétendirent en jouir malgré l'Abbé du lieu qui en était le seigneur, ils furent jugés et condamnés en la Cour du Roi en 1164, et Louis le Jeune marcha lui même pour les faire obéir. Mais peu après quelques prélats du royaume et particulièrement l'Archevêque de Sens prétendirent qu'il étoit d'obligation de conscience d'accorder la liberté à tous les Chrétiens se fondant sur le décret d'un concile assemblé à Rome par le Pape Alexandre III. Cette maxime fut toute-à-fait contredite en France où les seigneurs demeurèrent en possession d'affranchir ou de conserver leur droit en entier ainsi qu'ils le jugèrent à propos. Cependant plusieurs de ceux qui avoient paru les plus éloignés d'accorder la liberté à leurs hommes s'y déterminèrent dans la suite, au moyen des grosses sommes qu'ils en tiraient, ce qui produisit peu après l'usage de faire confirmer par les prélats et ensuite par les Rois, ces sortes d'affranchissemens. Les peuples qui avoient acheté leur liberté à prix d'argent, appréhendant que les seigneurs n'usassent envers eux de violence ou de mauvaise foi pour s'en faire donner d'avantage, eurent recours à l'intervention des Rois qu'ils offrirent même avant qu'on la requit parcequ'ils en connurent d'abord la conséquence, à la quelle les seigneurs firent, suivant la coutume Française, trop peu d'attention; et cette intervention donna dans la suite lieu aux Rois de se rendre juges entre les seigneurs et leurs sujets et par ce moyen de dépouiller les premiers de la plus grande partie de leur autorité.

* Such as that none but freemen shall sell by retail or practise any trade or occupation, or that nothing shall be sold by a foreigner to a foreigner within the city.

About the time of Edward the First the franchise of returning members to parliament was conferred upon a great number of towns, for the most part incorporated. The writs being executed by the bailiff or other chief officer, attracted them more within the sphere of regal authority, and they began to assume additional importance in a political point of view. Soon after the crown endeavoured to strengthen its control over them by introducing the writ of quo warranto, by which the judges in their iter were empowered to enquire by what warrant all who claimed any franchise, in derogation of the crown, maintained their title. This was doubtless no inefficient weapon in the hands of an active and vigilant monarch. In the 18th year of his reign another statute was made, to render them more immediately dependent upon the crown.* From that time applications from towns incorporated by the barons, for a confirmation of their former, or a grant of new charters became more frequent. Hence, as I apprehend, grew up the doctrine sufficiently agreeable to the king, and readily

* “ Concerning the writ that is called quo warranto, our lord the king at the feast of Pentecost, in the eighteenth year of his reign, hath established, that all those who claim to have quiet possession of any franchise before the time of King Richard, without interruption, and can show the same by a lawful inquest, shall well enjoy their possession, and in case that such possession be demanded for cause reasonable, our lord the king shall confirm it by title. And those that have old charters of privileges shall have the same charters adjudged according to the tenor and form of them: And those that have lost their liberties sith Easter last past by the aforesaid writ, according to the course of pleading in the same writ heretofore used, shall have restitution of their franchise lost, and from henceforth they shall have according to the nature of this present constitution.”

In conformity with this statute, it is laid down in 9 Rep. 28. that a grant of franchises anterior to the time of Richard I. is not a record pleadable of itself, but must be supported by some allowance of the king's courts or the justices in eyre subsequent to that time. And it was further said that such ancient grants must be construed according to the law at the time when they were made, and not according to the rules by which modern charters are construed.

enough asserted by the dependent judges of the king's own court, that no incorporation was valid without the regal sanction. Certain it is, however, that some towns neglecting this precaution, or having originated in the prerogative, and deeming it unnecessary, claim their franchises by prescription at this day. Not that almost all, if not every of them, have subsequently accepted charters of confirmation; but that their original constitution is not evidenced by any memento of royal or baronial concession, and doubtless some were self-constituted, assuming the privileges of other towns without grant or authority. From what time they obtained influence in the national council by sending thither their representatives, municipal corporations became daily the subject of more important consideration with the crown, which began to extend its influence over them, at first by encouraging popular elections and the spirit of freedom, for the purpose of strengthening itself against the barons, until, perceiving that to curb one rival it had raised a much more formidable opponent to its tyranny in those very representatives, it began to assume a different policy and endeavour to procure returns of its own creatures by discouraging popular elections of the municipal magistrates, and raising a sort of burgher aristocracy. It was in the fortieth year of queen Elizabeth's reign that the judges, upon the application of the privy council, determined that from usage, within time of memory, a by-law may be presumed restraining to a select body the right of election of the principal corporators, though vested by the ancient constitution in the popular assembly. And in the twelfth year of the reign of king James, the judges determined that the king could, by his charter, incorporate the people of a town in the form of select classes and commonalty, and vest in the whole corporation the right of sending representatives to parliament, *restraining the*

exercise of that right to the select classes; and this was the form of all the new corporations; 12 Co. 120. These doctrines, with more consideration of precedent than principle, have been carried in modern decisions to an extreme subversive of our ancient law, and established the opinion that the franchise of electing corporators can be surrendered by the commonalty not only for themselves but also for their successors.

The vacillating throne of the first Stuart was in the time of his son overturned by the power of corporate representation, which had then arisen to its zenith. The more decisive Protector, unable to cope with this power embodied and represented in the senate, with unconstitutional violence expelled them from the house. The restoration of the Stuarts placed on the throne of a free country a weak, licentious, and tyrannous prince, trembling at the power which had once already driven out his dynasty. He commenced a reign equally devoid of moral and political virtue, with expelling from all corporations the partizans of liberty, as well the disciples of Hampden and Sidney as those of enthusiasm and sectarian bigotry. A reign thus begun terminated in greater tyranny. The decisions of this period are to be received with great caution,* for the venom of party contaminated the fountains of justice, and the superior courts were put under the management of

* Brathwaite's case, 1 Vent. 19. and 2 Keb. 488. is of no authority; it was a strange case, wherein the judges asserted the power of the king and council to disfranchise members of corporations by their order, and even to pull down the walls of a town; so it might be they went upon such an order, and everybody knows that matters of prerogative went very high at that time; no record of that case is to be found. *Yorke, Solicitor General*.—I am very glad of it; I can have no regard to any opinion that was given, when judges were worked up to so extravagant a pitch as to assert such doctrine. *Pratt, C. J.*, 1 Strange, 387.

the minions of the crown. The sesquipedalian judges were engaged in pandering to the king's wishes, and the state was directed by hirelings in the pay of France. This, called the Augustan age, should have rather derived its name from Heliogabalus. To serve a venal court a venal parliament was necessary. There still mouldered in the nation the expiring fires of a brighter æra, and the parliament could not be rendered sufficiently complaisant until the corporations were garbled. To accomplish this, a measure as unjustifiable in principle as contrary to the established doctrines of our law, was resorted to. But the crown lawyers, more violent than learned, instead of first proceeding by *Scire Facias* to repeal the charters on pretence of forfeiture, which would have given the subsequent judgments at least the semblance of being conclusive, mistook their proceeding, and by filing Informations in the nature of *Quo Warranto* against all the obnoxious corporations, proceeded in such manner that it was impossible to obtain even the appearance of a lawful judgment against them, since it could be sustained only upon two grounds, either — that there were no such corporations ever established, and the bodies assuming to act as such were merely self-constituted, to which the charters and well-known ancient usage throughout the land offered a manifest contradiction ; or — that all the corporations had been dissolved for want of officers and members, and the persons assuming to act as such were all mere usurpers, to which the very form of the information offered a plain inconsistency, by admitting that the corporations of which they were accused as usurping the offices, were still in existence. Ill chosen and unjust as the measure was, judges were found* vile enough for the royal purpose,

* Pemberton, Chief Justice of the King's Bench, was removed to be Chief Justice of the Common Pleas, and Saunders, who had drawn the pleadings and advised on the part of the Crown, was

and after the most learned advocates in the land had been heard on the proceedings against London, judgment was given of seizure of its franchise to be a corporation into the king's hands, as forfeited. The determination of the information against the metropolis spread consternation through the kingdom, by the assistance of which and the intrigues of the court party, almost all the other municipalities were prevailed on either to suffer judgment against them by default, of which the crown made an use as erroneous as of the original proceeding, by treating it as a final and conclusive judgment; or to surrender their charters in hope of conciliating the despot's favour. Here too the crown lawyers mistook the law, or, confiding in the plenitude of arbitrary prerogative, thought its rules unworthy their consideration. New charters were granted without using the precaution to enroll many of the surrenders, on account of which they were wholly inoperative, even should we admit that a municipal corporation has power to surrender the franchise of being a corporation.

The labors of this prince were productive of no advantage to himself; for although the co-operation of his partizans, the servility of judges, and the verdicts of party juries effected the subversion of the corporations, and promised a parliament venal as the realm could produce; his alarm at any assembly which might pretend to represent the people, and be possibly influenced by their opinions, was so great, that he deferred the period of their convention, until death undermined the system of contrivance which with his management might have subverted the

raised to be Chief Justice of the King's Bench, just before the term in which the judgment was given. Quo War. p. 10.

Sir Edmund Saunders being made Serjeant, his rings had this motto: "*Principi sic placuit*," and the same day he was made Chief Justice of the King's Bench. 2 Show. 252.

constitution. This system soon fell, after it came under the management of a successor against whom the whole nation was exasperated. The first and only parliament of James the Second displayed the full influence of his brother's measures, the effect of laying corporations under the control of the crown, and vesting the election of their magistrates in the select classes ;—a parliament convened ready to forge chains for themselves and the nation,—a parliament whose servility needed only a little duplicity in the king to render him the most arbitrary sovereign in Europe.*

This prince, the misfortunes and chivalrous character of

* Lest my observations on this parliament, who in their timidity rather than repentance, tended to establish the form of government which followed the Revolution, should be thought to contain a tincture of prejudice, I offer the sentiments of Hume on the subject, an author rarely accused of calumniating a king.

“The low condition to which the whigs had fallen during the last years of Charles's reign; the odium under which they labored on account of the Rye-house conspiracy—these causes made that party meet with little success in the elections. The general resignation too of the charters had made the corporations extremely dependent; and the recommendations of the court, though little assisted at that time by pecuniary influence, were become very prevalent.

“He continued the parliament during a year and a half by four more prorogations, but having in vain tried by separate applications to break the obstinacy of the leading members, he at last dissolved that assembly; and as it was plainly impossible for him to find among his protestant subjects a set of men more devoted to royal authority, it was universally concluded that he intended thenceforth to govern entirely without parliament.

“Never king mounted the throne with greater advantages than James, nay, possessed greater facility, if that were an advantage, of rendering himself and his posterity absolute; but all these fortunate circumstances tended only, by his own misconduct, to bring more sudden ruin upon him. The nation seemed disposed of themselves to resign their liberties, had he not at the same time made an attempt on their religion; and he might even have succeeded in surmounting at once their liberties and their religion, had he conducted his schemes with common prudence and discretion.” Hume, *Engl.* ch. lxx.

whose family have excited our pity and admiration, though they cannot influence our opinion on the justice of his expulsion from the throne, after having tried in vain to avail himself of his brother's arrangements, endeavouring when too late to regain popular favour, abandoned them in despair, and issued a proclamation to restore corporations to their original state.

Some availed themselves of this advantage and a more constitutional reign ; but the select classes of corporations, unwilling to relinquish the influence they had acquired under the new constitutions of Charles, still retained in their grasp the municipal power, and by this means prevented the restoration of popular elections. It was a new case for the tribunals. The operation of the recent proceedings under the shadow of legal form, and of such surrenders and new incorporations, was not generally understood. Many of the former officers had died or removed from the municipalities—the new officers were of the royal party, and the aristocratic ascendancy was not easily overthrown. The doctrine of the case of corporations (sup. p. 8.) that by a by-law the corporation at large might be divested of the elective vote, that it might by the same method be reposed in the select classes, and that modern usage was sufficient evidence of such a by-law—in many instances, continued the constitution of corporations in the form instituted by Charles, under pretext of lost by-laws, after the charters were professedly abandoned.

So dilatory and expensive was it for the freemen to vindicate their rights, so much were they under the private control of the members of the select classes, so easy was it by compromise with the more active individuals to defer the inquiry, and so unimportant did this franchise in some cases appear, that at the present day many corporations are not emancipated from the influence of these tyrannical proceedings. The struggle has been violent and expen-

sive, the lapse of time had involved the question in new difficulties, and several important points on this part of the law were not settled until the decision of the case of *Chester*, in the House of Lords, after two trials in the country and one at bar.

Since the abdication of King James, the government has abstained from open interference with the liberties of corporations; but they have been incessantly disturbed by the cabals of private parties, for the purpose of influencing the returns of members to parliament: the effect of which has been to bring them more frequently under the inspection of the Court of King's Bench, and to introduce a new system of legal proceedings for the investigation of their conduct. The ancient Writ of Quo Warranto has long ago fallen into disuse. The Information, in the nature of a Quo Warranto, has been moulded into a regular form of action by the statute of the ninth year of the reign of Anne, aided by that of the thirty-second of George the Third and the determinations of the Court. Proceedings on the Writ of Mandamus have also assumed a similar regularity through the liberal interpretation of the same statute of Queen Anne and those of the eleventh and twelfth years of George the Third.

INTRODUCTION.

THE books abound with metaphysical definitions of the word Corporation, and from these it has been attempted to ascertain its nature. They are in general of so fanciful a character that I shall not introduce them, but describe a Municipal Corporation by its creation, purpose, and powers.*

When the people of a particular place, such as a city or town, are declared by competent authority to be incorporated, and are empowered to appoint one or more officers among them, they are constituted a Municipal Corporation, and the place is become a Municipality, commonly called a City, Borough, or Town Corporate.

A municipal corporation, like every other association, as a nation, a parliament, or an army, is regarded, both in common estimation and by the law, without relation to the individuals of whom it is composed. What it is en-

* The following is a fair specimen of the quaint definitions and logical deductions, which may be found in the earlier reports. "COKE—They are to show how a special supplicavit shall be directed to them, the opinion of Manwood Chief Baron was this, as touching Corporations, that they were invisible, immortal, and that they had no soule; and therefore no subpoena lieth against them, because they have no conscience nor soule; a Corporation is a body aggregate, none create soules but God, but the King creates them, and therefore they have no soules; they cannot speak, nor appear in person, but by attorney, and this was the opinion of Manwood Chief Baron touching Corporations." 2 Bulstr. 233.

titled to, or what it does as an association, is not considered the right or deed of any individual member; neither is the right or the act of any of the individuals the right or the act of the association. But we cannot with propriety call it a distinct Being or Capacity—it has not actual existence; we can only form of it an abstract idea.

The Authority by which corporations may warrant their existence, for it is more doubtful whence some actually derived it, is threefold. First, Prescription; that is, because they have existed from the reign of king Richard the First, or so long that no period subsequent to that time can be shown when they did not exist, they are entitled to continue. Secondly, Act of Parliament; for whatever is by that declared lawful must be acknowledged, and its institutions cannot be impugned. Thirdly, the King's Charter: this power has immemorially existed in the Crown, but the charter is wholly inoperative until it has been accepted by those to whom it is offered. — By no other authority can a corporation be supported.

A corporation continues the same body politic from its creation to its dissolution, unaltered by the revolution of ages or the successive changes of its members; so that it is unnecessary to make grants to them and their successors, or to declare their obligations binding on their successors.

The chief purpose of the institution is to regulate the internal affairs of the place. They are by the Common Law invested with the power of making ordinances or by-laws, for the government of all who live there. These are binding upon the freemen, because they cannot be made without their consent, and on strangers who come to reside within the jurisdiction, upon the principle, that by associating themselves with the corporation they promise submission to its laws.

It is for the Legislature or the Crown to appoint what

officers shall be in the corporation, for the administration of its affairs ; but the number of mayor, bailiffs, aldermen, &c. being thus constituted, the corporation has an incidental power of electing any of its members to fill these offices, and also of removing from office any one who shall be guilty of mal-administration, or of such offences against society as render him improper to hold any public situation.

Those who are sometimes called officers, but have only a ministerial capacity, may be appointed and removed at will, by the incidental authority of the corporation, although none are instituted by the statute or charter.

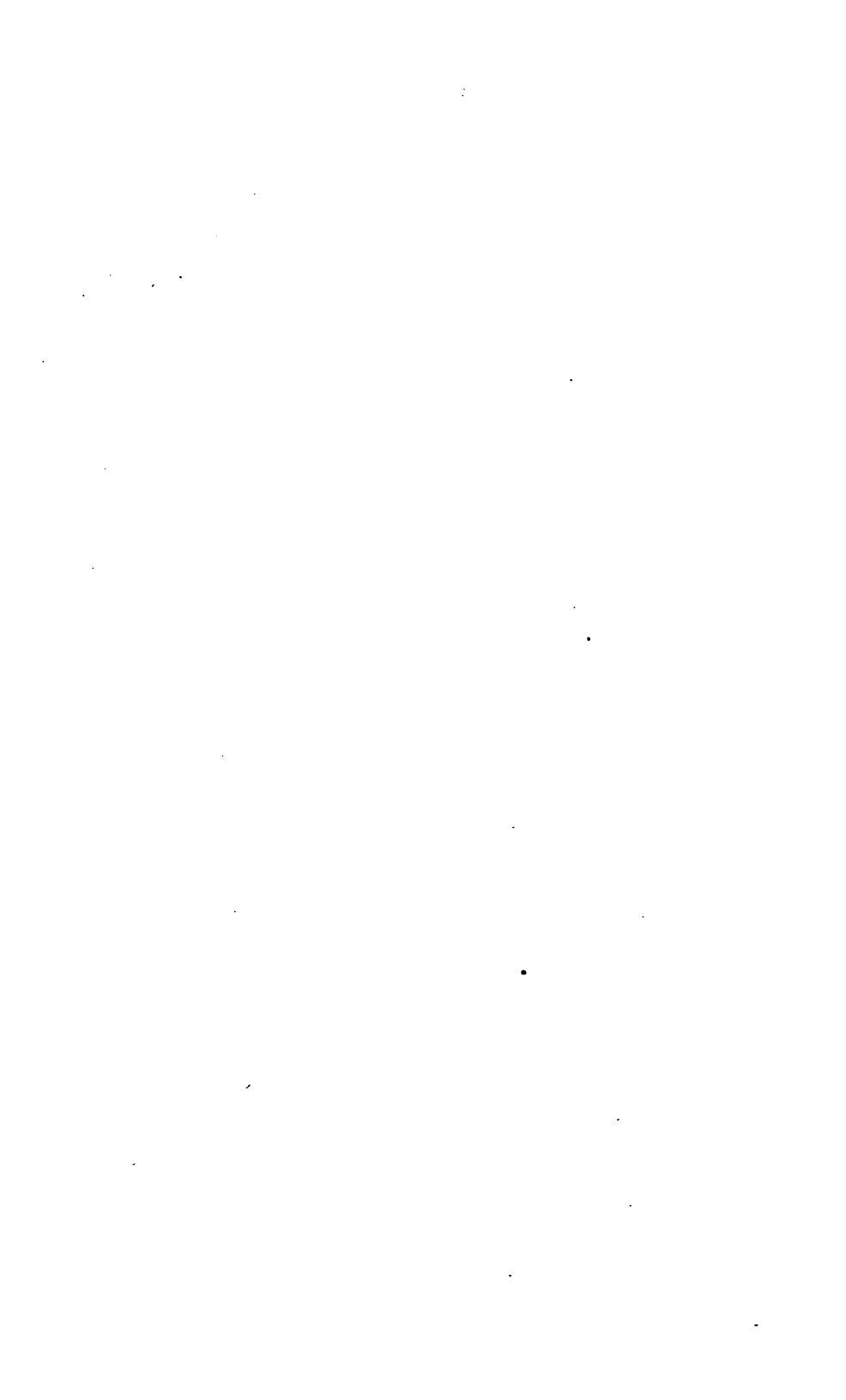
A corporation has a right to continue itself by the election of new members, without any restriction. This seems neither altogether consistent nor wholly inconsistent with the purposes for which municipalities were established. The earliest object of incorporation was the encouragement of commerce, by allowing the merchants to form guilds, with the power of making their own regulations. The next object was to bestow upon the more important towns a degree of independence, by giving them a domestic jurisdiction. Sometimes the guilds became absorbed in the general corporation ; in some instances the guilds remained distinct from each other, but were members of the municipal body ; and in some places the municipal corporation, was the only guild. The purposes then of municipal corporations were the security of commercial associations, and the investing of the inhabitants with the power of governing themselves. Hence it would seem that the only members of the subordinate guilds should be those of the associated merchants, who were generally of the same trade, and the only members of the municipal corporation the inhabitants of the municipality. But it was natural that those who were once members or inhabitants should be still regarded as freemen,

though they had long quitted the place, and that the freedom should be acquired by a temporary, and gradually by a very short residence.* The Saxon law required all the members of a township to be pledges for each other, imposing no inconsiderable responsibility; and therefore of course, it was necessary that new members should be acknowledged by some public act of association, and that strangers or improper persons should not be allowed to intrude themselves upon a society so responsible. This principle continued to prevail when the townships grew into greater importance and became municipalities. In this, I apprehend, originated the practice of admitting some and excluding others who came to reside, whether during a long or a short period. Under the Norman dynasty, the forms before established continued to prevail, and those inhabitants of the towns and municipalities who were acknowledged to be freemen and law-worthy, were enrolled, sometimes in the records of the municipality, sometimes in those of the court leet. When the government began to interest itself in the returns of members of parliament from corporate places, the practice of admitting non-residents became frequent, and it has been several times determined that corporations may supply themselves with new members, not only from the inhabitants of the place, but from any other source.

The consideration of these incidental powers and the restrictions imposed on them by prescription, statute, or charter, will occupy a large portion of this treatise.

* By the ancient law, uninterrupted residence within a borough for a year and a day entitled a villein to his freedom.

PART I.



CHAPTER I.

CONSTITUTION.

SECTION I.

CREATION.

1. A CORPORATION may exist by prescription, statute, or the King's charter, but that franchise cannot be claimed by any other authority.

I. CORPORATION BY PRESCRIPTION.

2. A corporation which has existed from time immemorial is called prescriptive, and supposed to have been originally constituted by sufficient authority. It is recognised as a legal body, possessed of all the reasonable powers and privileges which it has been accustomed to exercise, and subject to all ancient modifications and restraints; for the customs are received as evidence of the regulations contained in the supposed charter of incorporation. Its customs are not construed with the same strictness as the ordinances established by charters or by-laws in modern corporations, for the Kings of England at an early period of our history wielded

Prescription.

the whole of that authority which is now possessed by the Legislature, and were capable of creating corporations of a different character and with more ample powers than they can confer at the present day.

New Charter, &c.

3. A corporation originally prescriptive does not lose that character on account of a confirmation by statute, or acceptance of a charter, although its name and form of constitution be altered, as, if Bailiff and Burgesses are changed to Mayor, Aldermen, and Commonalty. Nor is the prescription determined by a seizure of the franchise on default in proceedings on the writ or information of quo warranto, nor by a seizure of the franchise of being a corporation on final judgment on an information in the nature of quo warranto; for in the first case (if such seizure be legal) it remains in the king's hands, and may be replevied by the members of the body, or restored on a pardon by the king; and in the other, the judgment may be reversed in error, or by act of parliament, as happened to the corporation of London on the accession of the Prince of Orange. Neither is the prescription determined when by the death or removal of all or the major part of the magistrates and governing officers, the corporation is as it were suspended, and incapable of performing the purposes for which it was established, for the king may revive and restore its activity by bestowing on it greater powers, or appointing new officers; and it is not necessary to the continuance of the prescription that it

(3) Colchester v. Godwin, Carter, 69. R. v. Pasmore, 3 T.R. 248. Colchester v. Seaber, 1 W.B. 591. Sir James Smith's case, 1 Shower, 278. S.C. 4 Mod. 58. R. v. Stratford on Avon, 14 East, 360. 2 Chest. Ca. 567. Vaughan v. Lewis, Carth. 228. 2 Jenk, Cent. 94.

be revived under the ancient name or form of constitution.

4. But if a prescriptive corporation be actually dissolved, and another created in its place, although invested with all its powers, privileges, and immunities, the latter cannot claim by the prescription of the ancient body. The rights may be transferred; but the prescription once determined can never revive. New Corporation.

5. In pleading a prescriptive corporation it is sufficient to call it by its present name, and allege that it is an ancient corporation, although both its name and constitution may have been changed by a succession of charters. And in this manner a prescription or custom may be averred to exist in it. But an opinion has prevailed that if it have received a name within time of memory it cannot prescribe by that, but must prescribe by the immemorial name unto the time of the change, and then by the new name, and so successively. Whenever a change of name is shown, it is necessary to show the charter by which it was changed. Pleaded.

6. A return that in the fifth year of Queen Elizabeth, and long before, they had been a corporation, is a sufficient allegation that it is prescriptive, and it is unnecessary to say, time out of mind. But the words "*tempore quo non extat memoria*" are nonsense, for the technical phrase is "*cujus contraria memoria non,*" &c.

(4) Chest. Ca. 567. R. v. Stratford on Avon, 14 East, 360.

(5) Colchester v. Godwin, Carter, 69. Com. Dig. Fran. F. 9. Mellor and Spateman, 1 Saund. 340. n. 2. S. C. 2 Lev. 253. Hard. 504. Kerby v. Wichelow, Lutw. 1498. Fazacherley v. Wiltshire, 1 Str. 463, 5.

(6) R. v. Durham, 10 Mod. 146. 1 Sid. 33. R. v. Amery, 1 T. R. 589.

Unnecessary charters.

7. It is not necessary to set forth all the charters by which a corporation has been confirmed, if the identity of the body politic appear on the record, together with the charter by which the plea may be supported.

Evidence to support.

8. To prove that a corporation is prescriptive, an ancient charter of confirmation, treating it as a pre-existing body, is *primâ facie* evidence. So is possession of lands belonging to the corporation from a very remote period. But evidence that the bailiffs have been accustomed to hold courts in the borough is not admissible for this purpose, because such courts might have been held though the borough were never incorporated.

To controvert.

This was granted an.
6 John.

9. To controvert the claim of a corporation to be prescriptive, evidence that there was formerly no corporate seal is admissible: so is a charter within time of memory containing words of incorporation, such as "*burgenses habeant gildam mercatoriam*," for the word "*burgenses*" does not imply a pre-existing corporation, but a borough only, and "*habeant gildam mercatoriam*" was sufficient to incorporate the people of a place. But a charter is not to be considered creative merely because it contains words of creation, if there be also evidence of its former existence. As a charter which recites that certain customs and privileges which had from time immemorial existed in a merchant guild could be no longer enjoyed by the inhabitants on account of the guild being dissolved, wherefore they had prayed to be "*made, reduced, and erected*" into a body corporate and then proceeds to incorporate them under a different

(7) *Kerby v. Wichelow*, Lut. 1502. *R. v. Amery*, 1 T. R. 589.

(8) *Ipswich v. Johnson*, 2 Barnard. 120.

(9) *Id. Ibid.* *R. v. Stratford on Avon*, 14 East, 360.

form, and to invest them with the privileges, &c. of the dissolved guild.

II. CORPORATION BY STATUTE.

10. The Legislature has not often exercised the power By statute. of creating Municipal Corporations, because it has been esteemed a flower of the Prerogative. Where the ordinary regulations alone are necessary, the King incorporates the place by charter; but where it is thought proper to invest the intended body with any extraordinary power or privilege, such as that of punishing by forfeiture or imprisonment, the aid of Parliament is necessary. Some incorporations are made by the crown, under parliamentary sanction; an act of parliament being first passed, enabling the King to incorporate a particular body with certain definite powers, so that a greater authority is derived from the statute; but the incorporation is the immediate act of the king. In other instances, where the kings of England having granted charters conferring extraordinary powers which are in so much void, the Parliament has subsequently ratified them and rendered the void clauses legal by their legislative sanction.

11. When the Legislature creates or confirms a Unalterable. corporation, the assent of the persons incorporated or confirmed is not necessary, on account of the plenitude of its power. And where the constitution has been once established by a statute either creative or confirmatory, it cannot be altered by any inferior

(10) Vid. stat. 13 Eliz. 29. 1 Kyd. on Corporations, 61.

(11) R. v. Miller, 6 T. R. 277. R. v. Haythorne, 5 B. C. 425.

authority, even in the regulation of its forms. Therefore a subsequent charter granted by the king and accepted by the people, cannot even alter the form of election instituted or confirmed by act of parliament, much less may a by-law pretend to effect such change.

Extraordi-
nary
powers.

12. The statute may invest the body with powers contrary to the general rules of law, but they must be granted in clear and unambiguous words; they will not be implied or presumed, and they must be exercised according to the strict interpretation of the grant. In almost all other respects a corporation created by act of parliament is similar to that created by the royal charter, for which reason I shall avoid alluding to the statutory incorporations, unless when it is necessary to point out their peculiarities.

III. CORPORATION BY CHARTER.

None but
the King
can incor-
porate.

13. A Municipal Corporation can be constituted only by act of parliament, or the King's charter. In creations by charter, the king must at least point out the persons and place, and constitute them a Corporation, but he may empower another to prescribe its form, appoint the necessary officers, and give it a proper name.

Formali-
ties.

14. It is usual for the charter to point out the place and constitute it a Corporation, to assign a particular

(12) *Kirk v. Nowill*, 1 T. R. 124.

(13) *Sutton's Hospital*, 10 Rep. 26, 27. 31. 33. Bro. Corp. 15. 45. 34.

(14) *Ib.* 27. 30, 31.

name, to appoint the proper classes, and what number there shall be in each class, and to nominate the first officers, or some of them, giving the Corporation power to elect them for the future, in a particular form and at stated times. But when the place is constituted a Corporation, the omission of any other of these formalities will not invalidate the charter, for it does not even appear to be absolutely necessary that a head officers should be appointed.

15. When the king has by his charter constituted the place a Corporation, and the charter has been duly accepted, the municipality is ipso facto incorporated, although the constitution is incomplete until the officers are appointed. When in-
corporated.

16. A Corporation may be created in any place where there is not an existing Corporation for municipal government, even where there has formerly been one, if it be now dissolved. But there cannot, at the same time, be two Corporations in the same place, having the same or similar powers, privileges, and jurisdiction. In what
place.

17. The decisions of the Courts are in favour of the opinion, that a municipal corporation may be seized on default in proceedings upon the information in the nature of a quo warranto; and true it is, that, whether legal or otherwise, such seizures have actually been made by our kings in times of arbitrary sway. It is in consequence held, that when a Corporation is so seized; in Custos.

(15) Sutton's Hospital, 10 Rep. 33.

(16) R. v. Amery, 2 T.R. 569. R. v. Pasmore, 3 T.R. 240. 243.
2 Chest. Ca. 556. 557.

(17) 2 Chest. Ca. 556. 557.

so much as the officers are, as it were, ousted from their places, and the former corporation is in abeyance; the crown may, by its charter, create a new municipal Corporation in that place, as custos of the franchise, until the default shall be pardoned or the franchise replevied; when either of these circumstances takes place, the authority and custody of the new Corporation are ipso facto determined, and the officers of the old Corporation are restored to the places which they held at the time of the seizure.

Void.

18. But when there is an erroneous judgment in quo warranto, as where the proceedings were in the Court of Exchequer; or otherwise, if a new Corporation be created in the place of the former, seized under pretence of such judgment, and supposed by such seizure to be dissolved, and though it be invested with the jurisdiction, rights, and property of the former, it is wholly illegal and void, as well as all its ministerial acts, and leases or grants of the corporate property.

Form of words to create.

19. To create a Corporation, it is not necessary that any particular form of words be used, if the King's intention to incorporate the place is evident. It has been held to be an incorporation, if the King grant to the burgesses of a town to have a merchant guild, or if he declare that they shall be a free borough, and that they may elect a mayor, and plead and be impleaded in the name of mayor and commonalty. Or if he "appoint ordain, and declare," that it shall be a free borough, with provost and aldermen, and that it shall have power to send members to parliament, although the word "grant" is omitted.

(18) *Pippard v. Drogheda*, 5 Bro. P. C. 369.

(19) *Sutton's Hospital*, 10 Rep. 28. 30. *Dungannon*, Hob. 14.

20. It is necessary that the charter of incorporation be under the great seal; except in the county palatine of Chester, where it may be under either the great seal or the seal of the county palatine; and in Lancaster, where it can be under no other than that of the palatinate.

21. In pleading it is sufficient to aver that the charter is "sub magno sigillo Angliæ," without saying "sigillata," for that it was sealed is implied by the word "sub." Plea, sub sigillo.

22. A charter must be pleaded either as granting or as confirming privileges; for if it be pleaded as "granting and confirming," it is double and the plea bad. This was said with much doubt, and reference was made to two former cases, in one of which the plea was held sufficient and in the other it was rejected. Plea double.

23. It is neither necessary nor usual to make profert of a charter; and if it should be made, the other party will not be allowed to haveoyer of it, even in the same term; for it is in the nature of a record, of whichoyer is never granted. But if the letters patent are not enrolled in Chancery, it may be a ground for applying to the court to order a copy. Profert.

24. A copy of the charter under the great seal, is not Evidence.

(20) *Asthill v. Clarke*, *Lutw.* 1237. *Stat.* 1 Ed. 4. *Jones v. Williams*, 5 D.R. 660. *R. v. Amery*, 1 T.R. 586. 2 *Chest. Ca.* 557.

(21) *R. v. Canterbury*, 1 *Str.* 674.

(22) *R. v. Trinity House*, 1 *Sid.* 86.

(23) *Anon.* 12 *Mod.* 232. *R. v. Chester*, 1 *Ld. Ray.* 299. *Chute v. Alport*, 1 *Sid.* 311. *R. v. Amery*, 1 T.R. 149.

(24) *Anon.* 12 *Mod.* 579. *Tooker v. Beaufort*, *Say* 297. *Leyfield's case*, 10 *Co.* 93. *Cragg v. Norfolk*, 2 *Lev.* 108. *Bul. N.P.* 226, 227.

admissible in evidence ; but a copy of the record ought to be produced, unless there be no record extant, when the charter itself should be produced, or a copy might perhaps be admitted.

Acceptance.

35. Though the king has power by his charter to create Corporations, yet he cannot impose the Constitution upon his subjects without their consent. The incorporation is intended for their advantage, yet it is accompanied with conditions and duties on their part to which they can only be subjected with their own acquiescence. Therefore it is as necessary to show the acceptance of the charter by those to whom it was offered, as that it was granted by the crown.

Must be unconditional and entire.

26. The charter must be accepted without condition, and by a due majority of those to whom it is granted. This holds alike as to a charter of creation or a charter by which the franchise of a pre-existing Corporation is confirmed or altered. There can be no partial acceptance, neither can there be an acceptance as to a part of the persons incorporated, as by the mayor and aldermen, if rejected as to the commonalty. There is a case in which it was said, that where a charter grants two distinct things, it may be accepted as to one of them, and as to the other rejected. If the grant be in the alternative, of course the acceptance can be of one only, for one only is granted ; but a question of this kind is not likely to arise. In another case it was said, that a charter of confirmation may be accepted in part, and in part rejected ; it was, however, an uncalled for observation, coupled with remarks which reflect

(25) *R. v. Pasmore*, 3 T. R. 240.

(26) *R. v. Amery*, 1 T. R. 589. *R. v. Westwood*. 4 B. C. 796. *R. v. Cambridge*, 3 Bur. 1656.

more credit on the gratitude than on the impartiality of the judges, and unnecessary to the principal case. The contrary doctrine is now too well established to leave any doubt. I apprehend that a partial acceptance would operate as an acceptance in toto, but that an acceptance by part of the persons incorporated is altogether nugatory.

27. When a company is created, and certain persons are nominated, with power to admit others, the charter need only be accepted by the majority of nominees; for they alone constitute the original Corporation, and those who are afterwards admitted manifest their assent by becoming members. By Fraternity.

28. When a charter of municipal incorporation is conferred upon a town or city, by which several classes are to be incorporated, as a mayor, a certain number of aldermen, a certain number of burgesses, and the commonalty, it is necessary that there be present a majority of each definite class, and some of the commonalty or indefinite class; and that the charter be accepted or rejected by a majority of the whole assembly, in the same manner as other corporate business is done when the power of transacting it is in the body at large. Municipal Corporation.

22. But it is said, that if a Corporation be created, consisting of mayor, aldermen, and common council, being classes of a definite number, and these are empowered to admit freemen, an acceptance of the Nominees only.

(27) *R. v. Askew*, 4 Bur. 2199.

(28) *R. v. Amery*, 1 T. R. 588.

(29) *Id. Ibid.*

charter by a majority of an assembly duly convened, and consisting of a majority of each of those classes, is sufficient. This I imagine to be an observation not sustained by reference to the principle of municipal Corporations; for it is permitting certain nominees of the crown, at their will, to take upon themselves the government of their fellow-citizens without the general consent, and would tend greatly to support the charters granted in the latter part of the reign of Charles the Second, which are regarded by modern Judges with a suspicious eye, insomuch that it has been frequently said by the Bench, that they will require very strong evidence of their acceptance. It is also contrary to principle, because, although select classes alone are nominated, if they be invested with local jurisdiction, all the people of the place are within the provisions of the charter; and the rule, that the charter is not valid without the assent of those to whom it is granted, is flagrantly violated. Where the King incorporates certain persons only, I apprehend that he cannot empower them to make by-laws obligatory upon any who do not become members. Unless, therefore, under such an incorporation, the majority at least of the inhabitants come in and be admitted to their freedom, however binding the conditions of the charter may be upon the select classes who have accepted it, they must be wholly inoperative as to the rest of the people of the place.

By new
Corpora-
tors and
Freemen.

30. If, after a Corporation has been suspended or dissolved, a new charter be granted, incorporating as well others as also some members of the ancient Corporation, it must be accepted as though it were a

Charter of creation; and the assent of the majority of the classes, duly convened, is sufficient, although all the ancient Corporators dissent.

31. But this Corporation is liable to be dissolved on the revival of the former Body, and such acceptance of the charter cannot be construed an acceptance by the former Corporation of a charter of confirmation, although all the re-incorporated members of the former body may have acquiesced.

When merely temporary.

32. It has been stated that the charter can be accepted neither conditionally nor partially; so also it cannot be accepted for a limited time. If it be received for one moment, it is obligatory for ever; unless afterwards altered by equal authority.

Cannot be renounced.

33. It is not necessary for him who pleads the constitution of a modern Corporation to show all the charters which it has received. If a recent charter be in its form creative, and sufficient to support the case, it is proper to avoid showing the pre-existing Corporation, and throw the proof of its legality upon the opposite party, who, if he rely upon it, must set it forth in his pleadings; and then it will be necessary either to show its dissolution, or acceptance of the new charter.

Constitution pleaded.

34. Whenever a charter is pleaded, it is necessary to aver its acceptance, or to show such usage as could not have prevailed unless it had been received, and from which the Court may necessarily infer accept-

Acceptance of Charter averred.

(31) 1 Chest. Ca. 22. R. v. Amery, 1 T. R. 584.

(32) R. v. Amery, 1 T. R. 585.

(33) Kerby v. Wichelow, Lutw. 1502. R. v. Amery, 1 T. R. 589.

(34) 2 Chest. Ca. 555. 549. R. v. Barzey, 4 M. S. 255.

ance; but it is not necessary to aver that it continues to be the constitution of the place, for that will be presumed until the contrary is proved.

SECTION II.

NAME.

35. Every Corporation has at least one name by which it may be identified; this may be either derived from usage, or conferred upon it by the statute or charter of creation.

Several
names by
usage.

36. A Corporation by Prescription, deriving its denomination from usage, may have more names than one; for if it be equally well known by one as by the other, it were difficult to find a criterion for ascertaining that which is the more proper; and, since whichever is adopted, there can be no possible doubt as to the identity of the Corporation, the law permits them to be used indifferently; but both names must be prescriptive, one cannot be acquired by usage within time of memory.

Only one
name.

37. A modern Corporation can have only one name for the same purpose; this arises from the circumstances of its being called in the charter by a particular name which is as unchangeable as the Christian name of a man conferred upon him at his baptism. If the charter do not declare that the body politic shall be called by a certain name, it obtains a name by implication; which is formed of the denomination of each class of which it is

(36) Com. Dig. Fran. F. 9. *Carlisle v. Blamire*, 8 East, 492. *Attorney-General v. Farnham*, Hard. 504. *Kerby v. Wichelow*, Lutw. 1502.

(37) *Knight v. Wells*, 1 Ld. Ray. 80. *Physicians v. Salmon*, 3 Salk. 102. Com. Dig. Fran. F. 9. *Dutch West India Company v. Moses*, 1 Str. 614. Anon. 1 Salk. 191.

composed prefixed to the name of the place incorporated; as if the inhabitants of Dale be incorporated with power to elect a Mayor, the name acquired by implication is that of Mayor and Commonalty of Dale: so the citizens of Norwich, incorporated to be a Mayor and Sheriffs, have by implication the name of Mayor, Sheriffs and Commonalty of Norwich.

38. An existing Corporation may be empowered, by statute or charter, to do a particular act, by a name different from that by which it was constituted or is usually known. If in the execution of that act, it use the constitutional name instead of that newly conferred, it is as much a misnomer as if it had used a name by which it was never before called.

Name to particular purpose.

39. A Corporation, whether ancient or modern, may change its name as often as it accepts a new charter, conferring upon it a new appellation. A distinction has been introduced, as to what name may be used after such an alteration. It is said that if the constituent parts of the corporation be not essentially altered, the old name remains together with the new; but that if the constituent parts of the corporation be essentially altered, as if a mayor be introduced where before there was none, the old name is lost, and that the use of it is a misnomer. But I apprehend that whenever a new name is received, that must be invariably used. The difference seems to have arisen from a doubt, whether the Corporation continued the same after such an alteration; but that remains no longer, for it may proceed in its new name to enforce rights acquired in the former, and

Change of name.

(38) *Cambridge v. York*, 1 Kyd, 256. *R. v. Croke*, Cowp. 26. 30.

(39) *Knight v. Wells*, 1 Ld. Ray. 80. *R. v. Ipswich*, 2 Ld. Ray. 1239. *Haddock's Case*, T. Ray. 439. *Colchester v. Seaber*, 3 Bur. 1870. Com. Dig. Fran. F. 9. 1 Lutw. 519. *Scarborough v. Butler*, 3 Lev. 238.

the same remedy is open to those who had claims upon it before the change.

Several
names.

40. It is said, that a prescriptive Corporation may retain its ancient name, after acquiring a new one by acceptance of a charter, but I apprehend that this observation may be referred to the two preceding rules.

Revived by
new name.

41. A Corporation which has been dissolved (or more correctly, suspended) by the loss of the governing members, may be revived by a name different from that by which it was formerly known, still preserving its identity and ancient rights.

Grant by, in
different
name.

42. If a Corporation make a grant or do an act which imparts an interest to another, under a name different from that which ought to have been used, it shall not avoid it by setting up the variance; for this were permitting it to do injustice to strangers, who may not be acquainted with the true name, which is possibly confined to the knowledge of members of the Corporation. In one of these cases the name was Mayor and Burgesses "of Lime Regis," instead of Mayor and Burgesses "of the borough of our Lord the King of Lime Regis:" in the second, indeed, it seems that no one knew precisely the proper name of the Corporation; therefore the court construed it to support the deed.

Grant to, in
different
name.

43. If a stranger do an act by which he imparts an interest to a prescriptive Corporation, denoting them by a name different from that by which they are usually

(40) Whitacre, 11 Mod. 67.

(41) Colchester v. Seaber, 1 W. B. 591. S. C. 3 Bur. 1870.

(42) Lyme Regis, 10 Co. 126. Ayray, 11 Co. 20.

(43) Carlisle v. Blamire, 8 East, 492. Knight v. Wells, 1 Ld. Ray. 80.

known, yet if the identity of the Corporation can be ascertained, he shall not be allowed to avail himself of the error to avoid it; but the Corporation shall be presumed to have been known by such name.

44. For the purpose of preserving regularity in legal proceedings, perhaps a slighter variation will be deemed sufficient to sustain a plea in abatement, which only puts the party to the necessity of proceeding again in a more accurate manner, than that which would be held necessary for the purpose of allowing a grant or other act to be avoided by the party who would derive advantage from setting it aside after having probably received a good consideration. And the court allows a variance to be taken advantage of upon plea in abatement, which it will not admit as sufficient ground for a nonsuit. It was held, that using the name of Mayor and Burgesses of the "borough of S." where the charter incorporated the place by the name of the Mayor and Burgesses of the "borough of S. in the county of S.," to be called the Mayor and Burgesses of "the borough of S. in the county of S." might be taken advantage of on a plea in abatement; but that a Corporation averring that it was incorporated by the former name, would not be subject to a nonsuit, though the latter appeared to be the true name, upon showing the charter; for this is an error in addition, and not in substance, and the defendant cannot say there was no such corporation.

Variance of
name in
pleading.

45. If the name of a Corporation be erroneously set out in a writ of Mandamus, the manner in which the defendant may take advantage of it, is by returning positively

Misnomer
in Manda-
mus.

(44) *Lyme Regis*, 10 Co. 126. *Stafford v. Bolton*, 1 B. P. 41. *Sherborne v. Lewis, Goulds*. 121. *Colchester v. Goodwin, Carter*, 69. *Ipswich v. Johnson*, 2 Barnard. 120.

(45) *R. v. Ipswich (Gippi)*, 2 Ld. Ray. 1239. S. C. 2 Salk. 435.

that the Corporation is not known by the name in the writ. It is insufficient to state the misnomer merely in the conclusion, after making a general return professedly in execution of the writ, particularly if it admit that the Corporation has been known by different names without setting them forth.

**Misnomer
pleaded.**

46. If the name of a Corporation be mis-stated in proceedings on an information in the nature of Quo Warranto, or any other form of action, it must be taken advantage of by a plea in abatement in all cases where, if the name of an individual had been mistated, there might be a similar plea. If the defendant plead "no such corporation," that is a plea in bar, to which the Corporation may reply by setting forth how they were constituted, and if found against the defendant, he is concluded.

**Replication
both names.**

47. If a Corporation have more than one name, to a plea of misnomer it may reply, as well known by the name in the declaration as by that in the plea.

**Amend-
ment.**

48. When the name of a Corporation has been mis-stated, the Court will allow an amendment after a plea in abatement, or in the entry of a judgment.

**Misnomer
pleaded by
a Corpora-
tion.**

49. If a Corporation plead a misnomer, it must be by an attorney appointed by a special warrant on a special application made to the Court for that purpose.

⁴⁶ Com. Dig. Pleader, 283 & Stafford v. Bolton, 1 S. P. 41. Malmesbury Case, cited 7 Mod. 221.

⁴⁷ Com. Dig. Pleader, 283 & Keeble v. Wicks, 1 L. R. 168.

⁴⁸ Malmesbury Case, cited 7 Mod. 221. See also 177.

⁴⁹ Fox v. The Corporation of London, 1 S. P. 41. See also 177. See also 177. See also 177.

50. As this work is confined to Municipal Corporations, it does not appear to me necessary to introduce all the nice distinctions between substantial and immaterial variances in setting forth the names of Corporations of a different character. A long list of them may be found by reference to Comyn's Digest, and Broke's and the other abridgements; but it is more than probable that many of them would not be considered authority at the present day. Indeed, though not expressly overruled, they have been severely denounced by Coke, as well as by Hobart, whose indignation is rather entertaining. If the name be the same in substance, the addition or omission of one or more words is immaterial. On this ground, the following variances have been held insufficient to sustain a plea of Misnomer:—"In" Carlisle, where it should be "of" Carlisle—"of" Exeter, instead of "in" Exeter—Mayor, "Bailiffs" and Burgesses of D., instead of "Mayor and Burgesses," when in fact Bailiffs were a class of the Corporation—Mayor and Commonalty "of the borough town of Maldon," instead of Mayor and Commonalty "of Malden," the Charter having taken notice that it was a borough.

Misnomer,
what is.

51. If the name of a Corporation occur collaterally in the pleadings, the same accuracy is requisite as if the Corporation were a party.

Name col-
laterally
mentioned.

52. It is unnecessary to introduce the name of the head officer as part of the name of the Corporation, but if introduced erroneously it may be pleaded in abatement.

Name of
Chief Offi-
cer.

(50) Com. Dig. Corp. B. 5. Doe d. Corp. Malden v. Miller, 1 B. A 703. Lyme Regis, 10 Co. 126. Pits v. James, Hob. 125. Villa de Darby v. Foxley, 1 Rol. 119.

(51) Com. Dig. Pleader, 2 B. 2.

(52) Com. Dig. Pleader, 2 B. 1, 2.

Title under
erroneous
name.

53. If the defendant in an information in the nature of Quo Warranto, plead an admission by A B. the Bailiff, when in fact the Bailiff's name is C. B., this is a fatal variance, but leave will be granted to amend, although the information is at issue and carried down for trial.

SECTION III.

FORM.

54. Corporations consist of officers in various gradations, who form the governing part, and in whom the powers of election, amotion, and making by-laws are very frequently vested by the prescription or charter, to the exclusion of the freemen who form the subordinate order. The several classes of officers, and the class of freemen, generally called the Commonalty, are denominated integral parts of the Corporation. Each class of officers usually consists of a definite number, which is ascertained by the prescription or charter. The Commonalty is generally an indefinite body.

Corpora-
tion com-
plete.

55. To the completion of the Corporation it is necessary that a majority of each class of officers be in existence, except where the charter has otherwise expressly provided. There is usually one head officer, called a Mayor, Bailiff, or Portreeve. There are sometimes two Bailiffs, head officers, holding distinct offices, and sometimes the two persons constitute but one officer. Formerly, if there had been a vacancy of the chief officer, and no power remaining in the Corporation to elect another, the body was considered to be dissolved, and the King had the right of appointing a new chief officer, and remodelling the Corporation. Jealous of this authority, the

(53) R. v. Hughes, cited 7 Mod. 221.

(55) Colchester v. Seaber, 1 W. B. 591.

§ Legislature, by the statute 11 Geo. 1. declared that such vacancy should not be a cause of dissolution, and conferred on the Corporation a power of supplying the office under the directions of the Court of King's Bench. Still, if there be not in existence a majority of each integral part, whose votes are necessary in electing the officers and members of the Corporation, the functions to the exercise of which such class is necessary are suspended; and by some the Corporation has been considered to be ipso facto dissolved. This point will be treated more amply under the title Dissolution; but I deem it well to show the complete state of a Corporation for the purpose of explaining the nature of a Corporate Assembly.

56. It is not often that any difficulty arises upon the words of the charter, as to the number of persons of whom each definite class is to consist; yet sometimes the provision is not very clear. If the charter name a Bailiff, and empower the Corporation to choose twelve Aldermen, and out of them annually to elect a Bailiff, the corporate number of Aldermen is twelve, and not thirteen, as may be imagined from the circumstance that the Corporation would seem to possess the right of electing twelve Aldermen during the year for which the Crown had nominated the first bailiff, and that, as all future bailiffs must be Aldermen, the first is created an Alderman by implication. If the charter empower the Corporation to elect as many as they think proper to be of a particular class, and subsequently name five to be members of it, there is no implied restriction in the nomination of the five.

Definite
number of
each class.

57. During the vacancy of the Mayor, the Corporation can do no act but that of electing another, the body

Corpora-
tion incom-
plete.

(56) *R. v. Thornton*, 4 East, 307. *R. v. Fowey*, 2 B. C. 594.

(57) *Year Book*, 21 Ed. 4. 58.

being incomplete. This observation, I imagine, can extend only to business which requires the concurrence of the whole Corporation or that which must be done by a select body, of which the Mayor is a necessary member ; and that it does not apply to acts which an integral part is empowered to do without the concurrence of the Mayor.

SECTION IV.

CORPORATE ASSEMBLY.

Corporate
business.

58. All Corporate affairs must be transacted at an assembly convened upon due notice at a proper time and place, consisting of a majority of the persons of each class, to which the prescription or charter has confided the power of performing that particular business, and under the superintendence of the proper president.

On Charter
days.

59. All Corporators are presumed to know what days and times are appointed by the usage, statute, charter, or by-laws for the transaction of particular business ; and, therefore, no notice is requisite for assembling to transact the peculiar business of such days. There is in all Corporations one day appointed for the election of the chief officer, on which it is the duty of each Corporator to attend. And when there is a day periodically appointed for the election of officers or new members, no particular notice is necessary ; but if there be a notice usual on such days, the omission of it renders the election void.

60. Courts periodically held may be adjourned for reasonable cause : if the whole business of the day cannot

(59) *R. v. Hill*, 4 B. C. 441. 443.

(60) *R. v. Carmarthen*, 1 M. S. 702. *Anon.* 2 Rol. 87.

be transacted during the same, the court may be adjourned to a convenient hour of the next. So a court held every Monday may be adjourned, if it happen to fall on Christmas-day.

61. But if a court be periodically held, at which the burgesses, being for that purpose assembled, "have" made elections, this cannot be considered a court for the express purpose of election, and, therefore, a particular notice is necessary.

62. Where a day is periodically appointed for one particular business, although no notice is necessary when that alone is to be transacted, or the mere ordinary affairs of the Corporation, yet if they intend to proceed to any other act of importance, a notice is as necessary then as at any other time.

Unusual
business.

I. NOTICE.

63. The election or amotion of an officer, a by-law, or any act of similar importance, if made without notice "on any day" which is not expressly set apart for that particular transaction by the constitution of the borough, is illegal and void.

When.

64. A particular notice must be given to "every member who has a right to vote," whether the act is to be done by a body consisting of all the definite classes, or of one of them only.

To whom.
Select
classes.

(61) *R. v. Hill*, 4 B. C. 441. 443.

(62) *R. v. Liverpool*, 2 Bur. 734. *R. v. Doncaster*, 2 Bur. 744. *R. v. Hill*, 4 B. C. 442. *R. v. Theodorick*, 8 East, 545.

(64) *R. v. Liverpool*, 2 Bur. 731. *R. v. May*, 5 Bur. 2682. *R. v. Shrewsbury*, C. T. H. 151. *R. v. Lisle*, Andr. 173. *Kynaston v. Shrewsbury*, 2 Str. 1051. *R. v. Faversham*, 8 T. R. 356. *R. v. Theodorick*, 8 East, 546. *R. v. Hill*, 4 B. C. 441.

Indefinite
class.

65. Similar notice must be given to every member of an "indefinite" body who has a right to vote, as in those cases where the incidental powers of the Corporation have not been taken away by charter or by law, but are still exercised by the body at large. Dict. per Kenyon, C. J.

Partial wa-
ver.

66. But if some of those who have a right to vote are assembled upon due notice, and every one of the others who has a right to notice attends without it, and consents to the proceedings being entered upon, the waiver of the notice is legal, and the act of the assembly cannot be impeached for the omission of it.

Who not
entitled to.

67. If a Corporator entirely quit the Municipality, neither retaining a house nor leaving his family within its limits, he is not entitled to personal notice to attend at any meeting where he has a right to vote. And if every member of the Corporation have so abandoned the borough, an election may be made by a sufficient majority convened in a proper place, and at a seasonable time, although no one member have received notice. — It seems, however, that if others than those who were present happened to be within the Municipality at the time of the meeting, a notice ought to have been given them to avoid the suspicion of surprise. — And I apprehend that an election on an ordinary day under these circumstances is not legal, where certain days are periodically appointed for filling up vacancies in the body.

Service of.

68. The notice must be served personally upon every resident member, or left at his house. In case of his

(65) *R. v. Faversham*, 8 T. R. 356.

(66) *R. v. Oxford*, Palm. 453.

(67) *R. v. Grimes*, 5 Bur. 2601. *R. v. Shrewsbury*, C. T. H. 151. and the authorities in support of paragraph 64.

(68) *R. v. Shrewsbury*, C. T. H. 152. *Kynaston v. Shrewsbury*, 2 Str. 1051.

temporary absence, it must be left with his family or at his last place of abode: it is no sufficient reason for omitting to summon him, that the officer had heard and believed that he had quitted the borough, and therefore returned him without reach of summons. And it is necessary, to support the validity of corporate acts, that each member be actually summoned: it is not sufficient that the proper officer was ordered to summon all the members; for the Court will not presume that he did his duty, through jealousy of the contrivances and surprise which may be effected under this pretence.

69. The summons must be issued by order of some one who has authority to assemble the Corporation for that particular purpose; but the want of authority may be waved by the presence and consent of all who have a right to vote. By whom issued.

70. It must be given a reasonable time before the hour of meeting, to prevent surprise. On this the Court will decide from consideration of all the circumstances. If it were usual to give the summons a certain time, before the hour of assembling, that interval will at least be required: but if it do not afford a sufficient opportunity to those who are willing to attend, usage will not justify so unreasonable a practice. Where the customary summons is sufficient for the residents, as if it require a notice of twenty-four hours, for the election of a capital burgess, in granting a Mandamus, the Court will not, on the application of the defendant, appoint a particular time for executing the writ, nor require a When given.

(69) *R. v. Hill*, 4 B. C. 444. *R. v. Sir R. Atkyns*, 3 Mod. 23. 2 Show. 238. S. C. *R. v. Gaborian*, 11 East, 86. n.

(70) *R. v. Hill*, 4 B. C. 442. *R. v. May*, 5 Bur. 2682. *Evesham Case*, 2 Stra. 949.

notice of six days to be given contrary to the constitution of the place, and for the conveniency of one party.

Notice under the statute.

71. Six days' notice is required to be given of elections to be made under the direction of the Court, in the particular cases to which this statute refers.

By parol, &c.

72. It is not necessary that the notice should be in writing; and if a bell which may be heard throughout the borough, is used for no other purpose than that of convening an assembly for the particular object of elections, it may perhaps be considered that sufficient notice may be given by ringing it at a certain usual and convenient time before the body is to meet.

Notice of time.

73. The notice must state the time at which they are to assemble, and the place, if different from that where such meetings are usually held.

Of the business.

74. It is not necessary to state what business is to be transacted, when it relates only to the ordinary affairs of the Corporation; but when it is for the purpose of election, amotion, or making ordinances, some intimation of it must be given, for such members as may think their attendance unnecessary for the usual routine of business will, perhaps, feel it their duty to attend upon such occasions, to counteract the spirit of party, and preserve the fundamental principles of their constitution. To a neglect of this notice alone, can be attributed those unconstitutional innovations which have crept into corporations, by which the body at large has in most cases been stript of their incidental rights, and the power of election, amotion, and disposing of cor-

(71) 11 Geo. I. c. 4. s. 2, 3. et vid. Mand. to elect.

(72) R. v. Hill, 4 B. C. 442.

(74) R. v. Tucker, 1 Barnard. 27. R. v. Shrewsbury, C. T. H. 151. R. v. Theodorick, 8 East, 546. R. v. Hill, 4 B. C. 441.

porate property, vested in them by their incorporation, have been arrogated to themselves by the select-classes, until at length the antiquity of the usurpation has given them a semblance of right, and the determinations of the Courts have conferred upon them a legal title under the pretext of lost by-laws duly made, of which there is no trace, and which common sense bids us believe had never existence.

When several affairs are to be transacted, although of an ordinary nature, it seems that the principal should be mentioned.

75. It was said, that when an amotion is intended, the notice should not only mention the purpose of the meeting, but state the name of the person to be proceeded against, and the offence with which he is charged, that the corporators may come better prepared to the discussion.—This I apprehend is not requisite, for a general statement will answer all purposes of justice.

Of amotion.

76. If there be a customary notice by ringing a bell an hour before the assembly ought to convene in the Guildhall, this cannot be dispensed with, even by the presence and consent of all the members after personal notice except two; and although these are not entitled to particular notice on account of residing out of the municipality. But there was a greater irregularity in this election: it was made in the midst of banquetting at an Inn, instead of being at a Council in the Guildhall. And I imagine that the case turned on the latter point.

Customary notice also.

77. If the Corporation be duly assembled either on

Waiver of notice by Corporation.

(75) *R. v. Liverpool*, 2 Bur. 375.

(76) *R. v. May*, 4 Bur. 2682.

(77) *R. v. Theodorick*, 8 East, 543. 545. *R. v. Tucker*, 1 Barnard. 80. *R. v. Gaborian*, 11 East, 86. n. 87. n. *Musgrave v. Nevins*, 1 Str. 584. *S. C.* 2 *Ld. Ray*. 1359. *Machell v. Nevins*, 2 *Ld. Ray*. 1357. *R. v. Carlisle*, 1 Str. 386.

the charter day for the particular business for which it is set apart, or at another time, being specially convened for the discussion of some particular affair in which they are all interested, and every Corporator is present; they may unanimously agree to wave the necessity of notice, and proceed to transact any other business in which they have all a right to join; but if any one person, having a right to vote, be absent or refuse his consent, all extraordinary proceedings are illegal.

By select
classes se-
parating.

78. And when the whole Corporation is assembled to treat of their affairs in their general capacity, if every member who has a right to join in the deliberations of a select body be present and consent, they may separate themselves from the rest, and proceed to the exercise of their exclusive powers. But if one who is entitled to preside at their meeting be absent, or do not acquiesce in the adjournment, although he have no right to vote, or have only a casting vote, all their acts are void.

Select class
entering on
other busi-
ness.

79. So if every member of a select body be present either at a meeting on the charter day, or specially convened, or even by accident at a proper place and time, they may, by unanimous consent, dispense with notice, and transact any extraordinary business within their peculiar province.

What dis-
sent avoids.

80. But if at any of these assemblies any one member who has a right to act in the proposed business be absent or dissent, the others have no right to proceed with-

(78) *R. v. Theodorick*, 8 East, 543. *R. v. Gaborian*, 11 East, 86. n. *R. v. Hill*, 4 B. C. 441. *Musgrave v. Nevinston*, 2 Ld. Ray. 1359. *Machell v. Nevinston*, Id. 1357.

(79) *R. v. Theodorick*, 8 East, 546. *R. v. Wake*, 1 Barnard, 80.

(80) *R. v. Theodorick*, 8 East, 545. *Musgrave v. Nevinston*, 1 Str. 584. S. C. 2 Ld. Ray. 1359. *Machell v. Nevinston*, Id. 1357.

out special notice. And when all are present, it ought to appear plainly from their conduct that they are unanimous.

81. Their unanimity is only necessary for entering upon the business; and after that has been manifested the new business may be transacted in the same manner as if the assembly had met upon proper notice.

What unanimity necessary.

82. These rules are subject to some exceptions. If the Charter require a special notice, this cannot be dispensed with, even by unanimous consent.

Exceptions. Notice required by Charter.

83. Nor ought an amotion to be made at such an assembly; but after the business of the day has been transacted, the person charged with an offence ought to have reasonable notice to appear and defend himself at a future assembly to be specially convened for enquiry into his conduct; but he may of course wave this advantage, and if he allow the charge to be brought forward and enter immediately upon his defence, there is no good reason why the amotion should not be considered legal.

Cases of amotion.

84. On the charter day for the election of the Mayor, the Corporation, although by unanimous agreement, cannot proceed to any extraordinary business until they have completed the election. Semb.

At election of Mayor.

85. When the Corporation is assembled on the Charter day, if it be the duty of a select body to separate and choose certain persons of whom another body is to

(82) *R. v. Theodorick*, 8 East, 543.

(83) *R. v. Carlisle*, 1 Str. 286. *R. v. Theodorick*, 8 East, 545.

(84) *R. v. Parkyns*, 3 B. A. 674.

(85) *R. v. Parkyns*, 3 B. A. 674.

elect one to be the Mayor, after they have separated they cannot proceed to any other business until they have made their nomination, notwithstanding an usage of one hundred and fifty years to this effect.

II. TIME.

According
to the new
Calendar.

86. "All courts and all meetings and assemblies of any bodies, politic or corporate, either for the election of any officers or members thereof, or for any such officers entering upon the execution of their respective offices, or for any other purpose whatsoever, which by any law, statute, charter, custom or usage are to be holden or kept on any fixed or certain day of any month, or on any day depending upon the beginning or any certain day of any month, except such courts as are usually holden or kept with any fairs or marts, shall be holden and kept upon or according to the same respective nominal days and times whereon or according to which the same are now to be holden, but which shall be computed according to the new calendar."

Proper
hours.

87. Concerning the time at which elections of the Mayor or head officers ought to be made, or other particular business done, something will be said in the subsequent chapters: it is only necessary to observe in this place, that if business be transacted at an inconvenient hour, or when the members are engaged in some other object, particularly a banquet, although every person necessary consent to enter upon corporate business, and wave the omission of notice, the Court will severely censure such conduct, and admit every consideration which will

(86) 24 Geo. II. c. 23. s. 1.

(87) *Musgrave v. Nevinson*, 1 Str. 584. S. C. 2 Ld. Ray. 1359.

tend to avoid their acts. It has not been so decided, but I apprehend that the impropriety of the time would of itself be held sufficient to vacate an election.

III. PLACE.

88. The Guildhall is the proper place for transacting ^{Guildhall} corporate business; or if there be none, some place in particular should be appointed. All acts done at another than the usual place bear the stamp of contrivance, secrecy and fraud, and the Court will suspect an improper motive. A meeting held at an inn instead of the Guildhall, particularly when partaking of an entertainment can scarcely be regarded as a corporate assembly, although all the members be present. Their conduct at such a place, and under such circumstances, has little the air of gravity and deliberation which should attend the discharge of offices of confidence and authority. On this ground I apprehend the case reported in Burrough was mainly decided.

89. Whenever the meeting is held at an unusual ^{Notice of} place, intimation of that circumstance must be ^{place.} contained in the notice, to prevent fraud or surprise.

IV. PERSONS.

90. In this respect, according to the ancient law, there ^{Two kinds} were two kinds of Corporate Meetings : the one consist- ^{of Assem-} ing of the body at large, or those of them who thought ^{bly.} proper, or were considered by their fellow-freemen most

(88) *Musgrave v. Nevinston*, 1 Str. 584. S. C. 2 Ld. Ray. 1359. R. v. *May*, 5 Bar. 2682. Vide tit. 76.

proper to attend. This is still, in legal supposition, the Common Council ; but as in fact the Common Council is now in almost every instance a Select Body, in which the freemen have little or no interest, to avoid the ambiguity of words, I will denominate this a Corporate Assembly. The other, which consists of one or more of the governing classes, and of which the largest is the modern sort of Common Council, I will call a Select Assembly.

Corporate
Assembly.

91. To constitute a Corporate Assembly, there must at common law be present the head officer, a majority of the members of each select class, and some of the commonalty, and of each of the other indefinite classes, if there be any.

Select As-
sembly.

92. To constitute a Select Assembly, there must be present according to the common law, a majority of each of the select classes of which it is composed, and of course if only one class, then a majority of them only is required.

Majority of
each class,
what.

93. The law presumes that a Corporation will always keep up the number of members which the prescription or charter has assigned to each definite class, and, therefore, a majority of each definite class means a majority of that number, of which by the regulations of the constitution each definite class ought to consist. This principle of law has uniformly received the liberal support of the judges, and they will not allow it to be infringed, except by the express provision of the charter, or unavoidable inference from the other regulations. The contrary doctrine would tend to multiply the grievances in Corporations, which already require frequent correction, and to facilitate the practice already too

general, of holding municipal franchises in very few hands, and directing them to unconstitutional purposes.

These rules will explain the subsequent decisions.

V. PRESIDENT.

94. The legal Head Officer, although not required by the charter, must be present, or the assembly is incomplete. This is the common law privilege attached to his office, that no corporate act done in his absence is valid. It has been objected that it empowers him to abuse his authority, and prevent the Corporation in the discharge of their duties, whenever it is for his private advantage to interfere with their designs. But it has been determined that this is no sufficient objection, and however obstinate he may be, or whatever private purposes he may wish to effect, in refusing to convene the assembly, or sanction it with his presence, yet that it can neither be legally summoned by another, nor can it proceed to any important business in his absence. Indeed, to convene and to elect a principal officer in his absence, and without his permission, is an offence indictable at common law. This doctrine may be sustained on the following grounds:—if the presence of the mayor were not necessary, there would be no corporate superiority in the office, and the very purpose of creating such an officer, is to prevent the confusion which would follow from leaving it in the power of every corporator to call together the assembly at pleasure. And as to the abuse of power, the law will not presume that any, in whom the Crown reposes a public trust, will be guilty of that temerity, in contempt of the supreme authority of the Court of King's

Head Officer.

(94) *R. v. Sir R. Atkyns*, 3 Mod. 23. *S. C.* 2 Shower, 238. *Tremayne* 233. *R. v. Gaborian*, 11 East, 87. n. 1 Rol. Abr. 514. 20. *R. v. Corry*, East, 380. *R. v. Trew*, 2 Barnard. 370.

Bench, which will not only compel a mayor to convene the Corporation at any time when a sufficient cause is shewn, by issuing the writ of Mandamus, but will chastise him when his abuse of office tends to the hindrance of the administration of justice in the Municipality, or is otherwise detrimental to the public interest, by allowing a criminal information to be filed against him.

Preside.

95. Not only must the Head Officer be present, but he must attend in his office and preside. The assembly can do no valid act, though the legal mayor be present, if he attend and act in the capacity of an alderman, imagining that he is really such by the determination of his superior office, on account of the person who actually presides having succeeded him; when in truth the new mayor is merely an officer *de facto*, from some disqualification, and his mayoralty is still undetermined.

Two Head Officers.

96. If there be two Head Officers, or two persons constituting one Head Officer, as if there be two bailiffs who may be elected separately and in a different manner, in which case they hold distinct offices; or if there be two bailiffs elected together, and treated by the charter as holding one office, in which case they constitute one officer, as the two persons who are Sheriff of Middlesex; both these persons must be present and preside: and if either of the persons holding the place of bailiff be merely an officer *de facto*, the assembly is incapable of any valid transaction.

(95) *R. v. Carter*, Cowp. 59.

(96) *R. v. Smart*, 4 Bur. 2243. *R. v. Thornton*, 4 East, 308. *S. C.* 1 *Smith*, 111. *R. v. Corry*, 4 East, 379. *R. v. Ipswich*, 2 Ld. Ray. 1237.

97. The person who presides, must be the legal officer. If an officer de facto, usurp the place, and be afterwards ousted in quo warranto, all the corporate acts which have been done under the sanction of his office are voidable; and in an information in the nature of quo warranto, it is open to the prosecutor not only to produce in evidence a judgment of ouster against the mayor, under whom the defendant was elected, but even to give evidence to impeach the mayor's title, although he is no party to the proceeding, or, it seems, although he have died undisturbed in the enjoyment of his office.

Legal President.

98. If the Mayor be elected for a year, and until another shall be elected, perfected, and sworn, if A. be legally in office, and at the expiration of the year, B. comes into the office, but is only an officer de facto, on account of some disqualification or irregularity, A. continues to be the legal Mayor, and no assembly is sufficiently constituted unless A. preside. He equally continues the legal officer, through a succession of years, although with each year a new officer de facto have come in; and after a series of such successions, the only method of restoring the Corporation to the capacity of legal action, is by A.'s resuming the office of Mayor. For all the corporate and ministerial acts of the intermediate assemblies are void.

Who is the legal Officer.

99. If the two bailiffs constitute but one officer, and A. and B. are duly elected, and become legal offi-

(97) R. v. Hebden, Andr. 391. R. v. Dawes, 4 Bur. 2279. R. v. Smith, 5 M. S. 279. R. v. York, 5 T. R. 72. R. v. Stacey, and R. v. Spearing, 1 T. R. 4. n. contra.

(98) R. v. Thornton, 4 East, 308.

(99) R. v. Thornton, 4 East, 308. S. C. 1 Smith, 111. R. v. Smart, 4 Bur. 2243.

cers, if after the expiration of the year, where there is a similar power of holding over, C. and D. be elected and admitted, and it afterwards prove that C. is only an officer *de facto*, from some disqualification or irregularity, but that D. laboured under no such objection—yet both A. and B. continue the legal officer, the election being vacated as to C.: the election of D. is void also; for the office cannot be divided. But it seems that if E. had the next majority of votes to C., and laboured under no disqualification, by the admission of E. the election of D. may be sustained and the office supplied.

100. But if the two bailiffs hold distinct offices, as is the case if one be called senior bailiff, and the other junior, the senior bailiff, eligible out of the aldermen in a particular manner, and the junior eligible from among the burgesses in a different form, and if these have a like power of holding over, no corporate assembly is legal unless the last legal senior bailiff, and the last legal junior bailiff both preside; although they may have been elected in different years, the one having held over perhaps five years, and the other one only, or though he came into office on the last charter day.

What acts
void under
president
de facto.

101. The legal officer must preside not only at the transaction of those affairs which are merely voluntary or convenient, such as the election of new members into the Corporation, or an indefinite class, but at those which are of the utmost necessity, as the filling up of vacancies in the definite classes, however much reduced, or the election of the annual officers, even the Mayor where there is no power to hold over; and al-

(100) *R. v. Smart*, 4 Bur. 2243. *R. v. Thornton*, 4 East, 308. *S. C.* 1 Smith, 111.

(101) *R. v. Lisle*, Andr. 174. *R. v. Hebden*, Andr. 392.

though at common law, by omitting such election the Corporation had been dissolved. What judicial acts are valid, though done by a president de facto, will be alluded to in another place.

102. At common law if on the charter day a sole Head Officer was not legally elected, the Corporation was suspended for want of a legal president; and this was also the case where of two distinct head officers there was only one legally elected, or where only one person of two who ought to compose one head officer had an unimpeachable title; for the deficiency of the other in both cases suspended the functions of the Corporation. But this has been remedied by act of parliament.

No legal President.

103. The Mayor must not only be present and preside, but must either propose the particular business, or acquiesce in the proposal of another. And if several distinct affairs are to be transacted, a similar sanction is essential to the validity of each, whether the members are convened for that particular act, or proceed to the discussion of it by general consent. Although it be an election to fill up vacancies, usually supplied on that day, or a nomination of candidates to be proposed to other electors, or the election of one of the candidates so nominated, which is an affair wholly distinct from the nomination, and requiring a distinct acquiescence on the part of the Mayor. This consent is implied from the Mayor's continuing to preside, and permitting the business to be regularly entered upon; but it cannot be

Who may propose the business.

(102) *R. v. Smart*, 4 Bur. 2243. *R. v. Thornton*, 4 East, 308. V. tit. Dissolution.

(103) *R. v. Gaborian*, 11 East, 86. n. 87. n. *R. v. Buller*, 8 East, 392. 1 Rol. Abr. 514, 20. *R. v. Williams*, 2 M. S. 141. 144.

presumed, when the electors adjourn to another room, although that is the usual practice, if the Mayor refuse to accompany them, particularly if he prevail on others not to go.

Must continue to
preside.

104. The Mayor must acquiesce by presiding from the beginning to the conclusion of each distinct transaction ; and if he quit the assembly before the election is complete and the majority ascertained, all further proceedings are void. I apprehend that the doctrine will not be carried to this length, if there appear no other irregularity in the transaction than the misconduct of the Mayor ; and if his departure were inadvertent, it would not perhaps be considered a withdrawing of his sanction from their acts.

Exception.

There is a case in which the contrary doctrine was carried beyond this exception. The Mayor had held an assembly for admitting freemen ; he had admitted some, and a list of names of other claimants was delivered in, after which the Mayor left the assembly and would not admit them. After his departure they were admitted, and this act was held legal, and their admission good. It is true, that this was a mere ministerial and formal act ; but it was considered a case of doubtful authority in *R. v. Buller*, and *R. v. Gaborian*.

Other President.

105. In some instances, either by the immemorial usage, or by the terms of the charter, the presence and presidency of the head officer are dispensed with, and

(104) *R. v. Buller*, 8 East, 393. *R. v. Gaborian*, 11 East, 87. n. *R. v. Williams*, 2 M. S. 141. 144. *R. v. Norris*, 1 Barnard. 385.

(105) *R. v. Gaborian*, 11 East, 86. n. *R. v. Corry*, 5 East, 381. S. C. 1 Smith, 543.

an alternative substituted. In such cases, of course, a corporate assembly may be held by the substituted legal officers when the head officer is absent; but if he be present, the other cannot assume to preside. In such cases all the requisites of legality must exist in the office of the person substituted, and if he hold by delegation from the head officer, he must not only be the legal deputy, but appointed by the legal principal.

106. The presence of the Mayor is not necessary at a select assembly, whether composed of one or more classes to whom a particular kind of business is delegated, unless it is expressly required. Therefore, if there be Mayor and a definite number of Aldermen and the charter declare that "the said Aldermen" shall yearly elect the Mayor, the presence of the Mayor "as Mayor" is required neither by the form of the charter, nor at common law, for this is an assembly of that integral part only and not of the Corporation.

Select Assembly.

107. The power lodged in the hands of the head officers had been so greatly abused, in still retaining the office after the expiration of their year, which was effected by avoiding to hold a corporate meeting on the charter day, at which alone successors could be elected, that the Legislature has interposed to introduce both a remedy for the omission, and to inflict a punishment on the offenders.

Alteration by the statute.

108. "In case upon the day next after the expiration of the time within which the election ought to have been made, unless such day shall happen to be Sunday, and then upon the Monday following, the Mayor, Bailiff or Bai-

Remedy — day past.

(106) R. v. Corry, 5 East, 379, 380. S. C. 1 Smith, 543.

(108) 11 Geo. I. c. 4. s. 1.

Next Pre-
side.

liffs, or other proper officer or officers who ought to have held the court or presided at the assembly for such election, or doing any other act necessary to be done in order to such election if the same had been made or done on the day fixed or within the time limited by charter or usage for that purpose, shall be absent; then such other person having a right to vote, being the nearest then present in place or office to the person or persons so absentsing himself or themselves, shall hold the court or preside in the meeting or assembly hereby appointed, and shall have the same power and authority in all respects therein as belongs to the Mayor, Bailiff or Bailiffs, or other Chief officer or officers of the same city, borough or town corporate, at any court or assembly for the election of officers for such place, or for doing any other act necessary to be done in order to such election."

Under
Mandamus.

109. Where an election is had by virtue of a Mandamus under this statute, "such officer or other person respectively shall preside in such assembly as ought to have presided at the election of such Mayor, Bailiff or Bailiffs, or other chief officer or officers, or at the doing any other act necessary to be done in order to such election in case the same had been made or done upon the day hereinbefore prescribed for that purpose."

Mayor's
adjourn-
ment
against
consent of
the majori-
ty.

110. If the Mayor begin to preside at an assembly convened by Mandamus under this statute, and pretend to dissolve it before the election is complete, the electors, if they give notice before either he or any of their fellow-electors have departed, may proceed to appoint the next in place or office president, and to complete the election; although they had not proceeded beyond the nomination of the candidate when the Mayor went

(109) 11 Geo. I. c. 4. s. 2.

(110) R. v. Gaborian, 11 East, 90. 92.

away. But not if the Mayor broke up the assembly on a fair question as to the equality of votes for the nominees. Nor if they did not give such notice to their fellow-electors.

111. The nearest then present in place and office can alone preside. An allegation that "one of the nearest" presided is insufficient; this is insensible, for there cannot be more than one nearest, and therefore "one of" would, I imagine, should the case recur be deemed surplusage. Where the offices are equal, seniority of office is the proper criterion. Next in place.

112. For improper conduct in preventing an election on the charter day, the head officer is punishable under two different statutes. Punishment.

113. "Where any such annual officer or officers is or are to continue for a year and until some other person or persons shall be chosen and sworn into such office, if any such officer or officers shall voluntarily and unlawfully obstruct and prevent the choosing another person or persons to succeed into such office at the time appointed for making another choice, shall forfeit 100*l.* for every such offence," one moiety to the king the other to the Informer. Neglect to preside.

This does not extend to Mayors or other head officers who have not the return of members to Parliament. Returning Officer.

114. "If any Mayor, Bailiff or Bailiffs, or other chief officer or officers of any city, borough or town corporate, shall voluntarily absent himself or themselves from or knowingly and designedly prevent or hinder Any Head Officer impeding.

(111) *R. v. Morgan*, 7 Mod. 322.

(113) 9 Anne, c. 20. s. 8. *R. v. Scott*. 1 Barnard. 24. v. tit. Election.

(114) 11 Geo. 1. c. 4. s. 6. *R. v. Corry*, 5 East, 381. S. C. 1 Smith, 543.

the election of any other Mayor, Bailiff, or other chief officer in the same city, borough, or town corporate, upon the day or within the time appointed by charter or ancient usage for such election, the person or persons so offending being thereof lawfully convicted, shall for every such offence suffer imprisonment for the space of six months without bail or mainprise, and shall be for ever disabled to take hold or exercise any office belonging to the same city, borough, or corporation."

The absence of the Mayor, to bring him under the penalties of this statute, must be in cases where his presence as Mayor is necessary to the validity of the election of his successor; therefore if the election be in a select body, of which, as Mayor, he forms no part, his absence cannot be punished under this statute.

VI. DEFINITE CLASSES.

Integral
parts, what
majority.

115. Besides the President there must be present at a corporate assembly a majority of each definite integral part, that is, a majority of that number by which each of these parts is constituted, and of which it ought constantly to consist, and not merely a majority of the surviving or existing members of each class. Indeed if there be not surviving a majority of the constitutional number, no corporate assembly can be formed, and the functions of every meeting in which that class ought to participate are suspended. According to some the Corporation is dissolved.

Therefore if the Corporation consist of Mayor, Bailiffs, Aldermen and Burgesses, unless as well as a majority

(115) *R. v. Morris*, 4 East, 26. *R. v. Bellringer*, 4 T. R. 823. *R. v. Thornton*, 4 East, 307. *R. v. Miller*, 6 T. R. 278. *R. v. Devonshire*, 1 B. C. 614. *R. v. Hill*, 4 B. C. 441. *R. v. Lathrop*, 1 W. B. 471.

of the other classes, a majority of the Bailiffs, being an integral part, and if they be two only, unless both be present, a corporate assembly is not convened; and should an assembly so defective make an adjournment, the presence of the Bailiffs at the adjourned meeting would not cure the original defect.

116. The court will not relax this rule on account of any general implication from the terms of the charter. On this ground the following decisions are founded.

Construe-
tion of
Charter.

117. At one time it was considered that the phrase "for the time being," referred to the state of the Corporation from time to time, and that when an act was to be done by a definite class or the majority of them for "the time being," it required only the presence of a majority of the surviving members at that time, although a less than the constitutional number. The effect of which would be that if the Corporation ought to consist of twelve Aldermen and twelve Burgesses, an act required to be done by a majority of each class for "the time being," might be done by two Aldermen and two Burgesses, if the number happened to be reduced to three members of each class. But the law on this point is now settled; and the words for the time being are rightly construed to apply to the persons who shall from time to time be the members of such classes. So that such an act can be done by no less than seven Aldermen and seven Burgesses, although at that time they are all who survive.

For the
time being.

118. And it is immaterial into what combination of words this phrase is introduced, for a majority of the

With other
words.

(117) *R. v. Morris*, 4 East, 26. *R. v. Bellringer*, 4 T. R. 823. *R. v. Bower*, 2 D. R. 770. *R. v. Wyllyams*, 3 D. R. 81. S. C. 1 B. C. 614.

(118) *R. v. Bower*, 2 D. R. 770. S. C. 1 B. C. 498.

constitutional number of each definite class is requisite if the charter direct the act to be done by the Mayor, Aldermen, Bailiffs, capital and other Burgesses and inhabitants "for the time being" assembled, or the greater part of them by the majority of voices "of them so assembled."

Surviving
and re-
maining.

119. The words "surviving and remaining," may be imagined still more positively to refer to the existing number of members in a definite class, and to derive greater force from the presence of a majority of those surviving and remaining being required at elections to supply vacancies in the same class, when from necessity it must consist of at least one less than the constitutional number. But even from this the implication is not so strong as to induce the courts to admit a violation of the rule; and therefore if there ought to be twelve capital Burgesses, and the Charter directs that when a capital Burgess is dead or removed, the other capital Burgesses "at that time surviving and remaining," or the greater part "of the same," shall elect another to be a capital Burgess, the election is void unless seven capital Burgesses be present.

Charter re-
quiring
such major-
ity.

120. Sometimes the terms of the charter are too clear to permit a doubt that a majority of the constitutional number is requisite; yet before the preceding rule was firmly established, it was necessary for the Court to determine that less than six Burgesses were insufficient to elect when the charter directed, that the Mayor and "the eleven Burgesses" or the greater part of them should assemble in order to proceed to the election of a Mayor.

(119) *R. v. Devonshire*, 1 B. C. 617. S. C. 3 D. R. 81.

(120) *R. v. Grimes*, 5 Bur. 2601.

121. Sometimes perhaps the construction of a charter requires the assembly to consist of more than a simple majority of the select class; for it was held that when the Corporation consisted of a Mayor and eleven Aldermen, and the charter directed that two Aldermen should be nominated, of whom one should be elected by "the *then residue* of the Aldermen or the major part of them," there must at least be present five Aldermen (the majority of nine the residue of the constitutional number after two had been nominated) besides the Mayor and the two nominees, making altogether seven Aldermen instead of a simple majority of six. But perhaps it is not necessary that the nominees should be present, and the Mayor and five or at least six Aldermen may proceed to an election if they nominate two of those who are absent.

More than
a majority.

122. But if the Charter plainly and explicitly empowers a less number to make an election, the court cannot assume to alter the constitution. I am not aware of an election of this kind having been contested since the preceding rules have been so well established, but on this ground perhaps the following opinion may be supported, although I do not consider it irrefragable.

Exception
by Charter.

The election was to be by the portmen or the "residue for the time being," or the greater part of them, and it was considered that an election by the only surviving portman was sufficient, but the case was determined upon another ground.

123. If the words of a charter are doubtful, rather than overturn a long established usage, it seems that the

Exception
by doubtful
charter and
usage.

(121) R. v. Smith, 2 M. S. 579.

(122) R. v. Hoyte, 6 T. R. 432. R. v. Richardson, 1 Bur. 541.

(123) Id. *ibid*.

Court will relax the rule ; but no case has yet appeared sufficiently strong to be sanctioned by a direct determination in favour of this position.

Exception
by custom.

124. In a prescriptive corporation, the customs explain the terms of the supposed charter, and if the custom be clear to elect at an assembly of less than a majority of the constitutional number of members, of a definite class, such an election is valid. Such a custom may be supported by an uncontradicted usage of forty years, that is, such usage will be admitted as *primâ facie* evidence of the custom. In which case it may be controverted by showing a general practice to the contrary at a more remote period.

Common-
alty and in-
definite
classes.

125. To complete a corporate assembly, some members of each indefinite class must be present. There are few corporations in which there is more than one indefinite class, and this consists of the common freemen sometimes called burgesses ; but in general burgesses are members of the lowest definite class, and the indefinite body is usually called the Commonalty. This class, for whose advantage we may presume that Municipal Corporations were at first principally intended, has grown into low repute in Courts of Justice, and their corporate rights have for a long while received little consideration. It is said, it matters not how few of the plebeians are present. Indeed, we are not fond of popular bodies ; for, as Boulainvilliers has remarked, when they taste a little liberty "*le desordre, la hardiesse, et l'insolence les soulevent contre leurs seigneurs.*"

(124) R. v. Hoyte, 6 T. R. 432.

(125) R. v. Varlo, Cowp. 250. R. v. Monday, Cowp. 539. R. v. Bower, 1 B. C. 498. S. C. 2 D. R. 770. R. v. Bellringer, 4 T. R. 822. 2 Ches. Cas. 5.

When the number of common freemen is very great, their presence at corporate assemblies would be found very inconvenient, and their votes would generally outnumber those of the select classes; for which reason in prescriptive corporations, there generally exists a Common Council to represent them, who are sometimes, and always ought to be, a certain number of the common freemen periodically elected by the remainder. Other devices have been resorted to, for the purpose of controlling the popular assembly. One of these is the suppositious by-law to which I have already referred; by this a similar sort of Common Council has been introduced into modern corporations. Another is a more open invasion of their incidental rights; the provisions in some charters, which have saved them the trouble of legislating for themselves, and created a Common Council to act in their name; a body sometimes as permanent as any other of the select classes, and of which they compose a principal part. Where there is a Common Council consisting of a definite number, their assemblies are of course regulated by the foregoing rules.

126. Where a Common Council exists, an assembly of them, though a select class, must be considered a Corporate assembly, and the presence of the legal president is necessary, although not required by the charter. Common Council.

127. Where the Corporation consists of the head officer and indefinite classes alone, there ought to be no extraordinary business transacted except on particular Indefinite body only.

(127) R. v. Locke, Vin. Abr. Corp. G. 3. 8. R. v. Varlo, 1 Cowp. 250. R. v. Monday, Cowp. 539. Lane, 21. R. v. Bellringer, 4 T. R. 822.

days, appointed by usage, charter, or by-laws. And on such days it must be done by a majority of those who are assembled, although not a majority of the body, or of the particular classes if more than one. It would be very inconvenient to resort to a personal notice in such cases, on account of the uncertainty and number of persons; and it would be permitting all manner of contrivance and surprise, if business could be transacted by a majority of those who might happen to convene at any other time. Under particular circumstances a general notice might be held sufficient.

Unnecessary class must not interfere.

128. It may be unnecessary to add, that whenever a particular business is delegated to a select body, if others join in the performance of it, the act is void; as if the mayor, aldermen and commonalty join in making a by-law which is directed to be made by mayor and aldermen. For if others are allowed to vote, a by-law might be established, although all those to whom the power is specially delegated should be in the minority.

Alteration by Stat. 11 Geo. I.

129. The only alteration as to the persons of whom a corporate assembly is to consist, which the statute of 11 Geo. has introduced, is that it dispenses with the attendance of the head officer; for the same persons and classes must concur, whether it be in an election under that statute, on the day after the charter day, or under the directions of a writ of Mandamus issued in pursuance of it; and that it allows the presiding officer to have a double capacity, in as much as he is one of the aldermen or capital burgesses. Therefore, if where the constitutional number of such officers is eleven, there

(128) *Parry v. Berry*, Comyns, 269. *R. v. Head*, 4 Bur. 2521. *Hoblyn v. Regem*, 6 Bro. P. C. 520. *R. v. Westwood*, 4 B. C. 799. 818. *Green v. Durham*, 1 Bur. 131.

(129) *R. v. Nance*, 7 Mod. 342.

are five present besides him, it is a sufficient majority, which is not always the case when the Mayor presides.

130. If, previous to the election, it is the office of the aldermen to nominate several candidates, the alderman who presides in the room of the mayor, may join in the nomination as an alderman, although the mayor, had he presided, could not have joined in it. And the president occupies characters so entirely distinct, that after joining in such nomination, if there were a power in the mayor to strike out the name of one of the candidates, before the election was entered upon, he may do the same, as representing the mayor; for there is no incompatibility between his permanent and temporary offices.

Double capacity of President under the statute.

131. "No election under the directions of this act, nor any act done in order thereunto, shall be valid unless as great a number of persons having right to be present and vote therein shall be present at the assembly holden for such purpose, and concur therein as would have respectively been necessary to be present and concur in such election or act in case the same had been made or done upon the day, or within the time appointed for that purpose, by the charter or usage of such city, borough, or corporation, saving only that the presence of the mayor, bailiff or bailiffs, or other chief officer or officers who ought to preside shall not be necessary."

Persons.

132. "Where the nomination of persons in order to the election of any mayor, bailiff, or other chief officer or officers is to be made at a court-leet or other court, in every such case, after such nomination

(130) R. v. Nance, 7 Mod. 342.

(131) 11 Geo. 1. c. 4. s. 5.

(132) Id. *ibid.* s. 3.

made, all and every other act and acts necessary to be done in order to such election, shall be had, made, and done at such assembly and in such manner and form as the same ought to have been had, made, and done in case such election had been made upon the day next after the expiration of the time prescribed for such election, by the charter or usage of such borough or corporation according to the directions herein-before mentioned."

General
majority of
voices.

133. When the corporate assembly is duly convened, it is not necessary that there be a majority of any or all the select classes in favour of the measure, but the votes of mayor, alderman, burgess, and common freeman, or whatever persons have the management of the affair, are of equal account, and the proposal must be carried or rejected by a general majority of the aggregate assembly.

Casting
vote or ne-
gative.

134. And neither the mayor nor any other member has a casting vote, much less a negative upon the general opinion, unless especially conferred by the charter or custom; for it cannot be given him by any by-law, and whenever such a vote is relied upon, it must be shown in the pleadings.

Votes of the
Quorum
unnecessa-
ry.

135. If the charter provide that the election shall be by the two bailiffs, two aldermen and burgesses or the major part of them, of whom "we will that one of the bailiffs and one of the aldermen be two"—it does not require that a bailiff and alderman, or either of them

(133) *R. v. Varlo*, Cowp. 250. *R. v. Monday*, Cowp. 538. *R. v. Miller*, 6 T. R. 280. *R. v. Bower*, 1 B. C. 498. S. C. D. R. 770.

(134) *Anon. Lofft*. 315. *R. v. Ginever*, 6 T. R. 735.

(135) *Cotton v. Davis*, 1 Str. 54. *R. v. Bal. &c. de Gippo*, 2 Ld. Ray. 2136.

vote for the person who is elected by the general majority. The election is good, although all the bailiffs and aldermen vote in the minority ; for the charter requires only that the assembly be sanctioned by the presence of one of each of those classes, which is indeed less than the common law would require ; for were there not this provision, both bailiffs and both aldermen must be present to complete the assembly ; and so of the mayor, his presence but not his vote is necessary.

136. " All and every peculiar act, order, rule, and estatute, heretofore made or hereafter to be made by any founder or founders of any hospital, college, deanry, or other Corporation, at or upon the foundation of any such hospital, college, deanry, or Corporation, whereby the grant, lease, gift, or election of the governor or ruler of such hospital, college, deanry, or other Corporation, with the assent of the more part of such of the same hospital, college, deanry, or Corporation as have or shall have voice of assent to the same at the time of such grant lease, gift or election, hereafter to be made should be in anywise hindered or let by any one or more, being the lesser number of such Corporation, contrary to the form, order or course of the common law, shall be from henceforth clearly frustrate, void, and of no effect."

No negative vote can be given.

This statute was made to facilitate the assumption of the church lands ; but it would *possibly* extend to Municipal Corporations, and is for that reason introduced. At least, it is a rule which, in all probability, the Courts would use as a criterion in construing a charter or by-law of a Municipal Corporation, if such should ever fall under their consideration.

Majority
not alter-
able.

137. If the original Constitution empower a less number than a majority of the whole body to do a certain act; and a by-law be made requiring a majority for the validity of such an act, the by-law is void.

Votes, how
given.

138. Each member who intends to vote must be present in person, for he cannot give his vote by proxy; and if necessary to ascertain the majority, the votes must be given deliberately and in succession.

Business
prohibition.

139. If a corporate or select assembly enter upon the discussion of business, over which they have no jurisdiction; as if the Common Council of London, not having cognizance of an election, proceed to investigate its validity, the Court of King's Bench will grant a prohibition, but if their jurisdiction be shown, a consultation will go. The general business which is transacted by a Corporation as a court of justice, forms no part of the present design; for in that respect they are to be looked upon as an inferior Court, and not as acting in a corporate capacity. The last case has been introduced because it is of an equivocal character: something will, in another page, be said concerning courts for corporate purposes.

(137) *Hurscot's Case*, Comb. 203.

(138) *Dean and Chapter of Fernes*, Davis, 47, 48.

(139) *Jeffs v. Bolton*, Fortesc. 349. S. C. 11 Mod. 386.

CHAPTER II.

ORDINANCES.

A CORPORATION is governed by certain regulations What.
 which I include under the general term of Ordinances.
 These are of three kinds:— The first comprehends that Customs.
 class of customs which prevail in a Municipality, and
 are so intimately connected with the Corporation, that
 at its dissolution they would necessarily cease; for
 other customs, which are rather local than corporate,
 such as relate to the descent, distribution, and disposal
 of property, the forms of legal procedure, and personal
 rights of the people who dwell there *, and which would
 continue to prevail although the Corporation were ex-
 tinct or the franchise abolished, fall not within the
 range of this treatise. — The second kind includes the Regula-
tions.
 regulations prescribed to the body politic, by the statute
 or charter of incorporation, and those to which they
 have subsequently submitted by acceptance of new
 charters, or which have been imposed by subsequent
 acts of parliament. — Those of the third kind are the By-laws.
 rules commonly called by-laws, a word on whose ety-
 mology lawyers differ, but that which most corresponds
 with their character is to be traced in Coke's definition

* Such as the custom concerning orphans; the peculiar and ancient rights of devising land and granting in mortmain; and the custom of foreign attachment in London. What connection these have with the municipal franchise will appear from reference to title Dissolution, where the earlier principles of incorporation will be developed.

of the word Bye, which signifies an habitation, and thence Bye-law may be defined the law of the inhabitants of a particular place, made among themselves in contradistinction from the general law of the realm.

SECTION I.

CUSTOMS.

Their origin.

Against common right.

140. Certain customs prevail in prescriptive Corporations, which, being of very ancient usage, and their origin unknown, are presumed in legal phraseology to have existed time out of mind. These are either regarded in the light of regulations prescribed by an ancient charter, in the same manner and of the same force as similar regulations imposed by modern charters, or as powers and privileges conferred by similar authority. Of the former kind it will be unnecessary to treat in this place, as they fall under the same rules of construction as similar regulations in modern charters. And of the latter kind, I shall seldom notice such as are similar to those which may now be conferred, for they are within the general rules, but proceed to point out such of them as, from their antiquity, the Courts allow to continue in consideration of the plenitude of regal power at the time the places in which they prevail were incorporated, and the necessity of yielding encouragement to commerce, at that time almost exclusively confined to corporate towns, although they will not tolerate the exercise of similar usurpations under pretence of concession by modern charters. These are frequently called customs against common right, and principally relate to the exclusion of all except freemen, from carrying on their trades or occupations within the municipalities; or to the

exercise by corporations of the power of imprisoning the persons, or seizing upon the property of those within its jurisdiction, for misconduct in their trade or corporate capacity.

141. These customs have not experienced much favor in Westminster Hall, because they are incroachments upon the rights and liberties of the subject. Holt, Chief Justice, entertained great doubt whether antiquity was a sufficient sanction for their continuance, and was very desirous of restricting them to London, in which their legality had been established by former decisions, and where they derived a greater semblance of authority from confirmation by parliament. But it being resolved that the Act of Parliament extended only to the confirmation of such as were originally legal, the claims to similar customs in other prescriptive Corporations resting on the same basis must be equally allowed, or those of London declared contrary to law. And now it is firmly established that such customs are legal; but the Courts will expect them to be incontrovertibly proved.

Not favored
in the
Courts.

I. VALID CUSTOMS.

142. The first class of customs comprehends those which exclude foreigners, (a term signifying persons who have not been admitted to the freedom of that Corporation) from trading or following their occupation within the municipality; of which kind the following have been held good.

Excluding
foreigners.

(141) *Wilton v. Wilks*, 2 Ld. Ray. 1133. 1129. *Hamburgh Comp.* 1 Mod. 212. in notis. *York v. Wellbank*, 4 B. A. 440.

From trade
or occupa-
tion.

143. That no foreigner shall use any trade, art, mystery, occupation, or craft within the municipality, although it do not except practising his art for his private use, for this is implied.

Unless af-
ter appren-
ticeship.

144. Or that *no one* shall exercise his trade there unless he has served an apprenticeship to such trade.

Keeping
shop, &c.

145. Or that no foreigner shall keep shop, either by open exposure of goods, or by selling by retail in private rooms, generally called keeping shop, either directly or indirectly, or keeping outward or inward shop, although it do not except fairs or markets, at least the Court will not take notice that there are any.

Except at
fairs, &c.

146. Or that no foreigner shall expose goods to sale, except on fairs or market days, although it do not except victuals.

Without li-
cence of the
Corpora-
tion.

147. Or exercise any particular trade or open shop either directly or indirectly, until he shall have compounded with the Corporation.

Manual oc-
cupation.

148. Or that no foreigner shall use a manual occupation, though a restraint on the exercise of bodily labour; as that of a corn porter or weaver; and that the right of portorage from ships and meterage of merchandize belongs to the Corporation within certain bounds.

(143) City of London's Case, 8 Rep. 129. a. Colchester v. Goodwin, Carter, 118. Bodwic v. Fennel, 1 Wils. 237. Woolly v. Idle, 4 Bur. 1951.

(144) City of London's Case, 8 Coke. 129. b.

(145) City of London's Case, 8 Co. 128. York v. Wellbank, 4 B. A. 440. Harris v. Wakeman, Sayer, 255. Hesketh v. Braddock, 3 Bur. 1853.

(146) Moir v. Munday, Sayer, 181,

(147) Ipswich v. Johnson, 2 Barnard. 120.

(148) Weavers of London v. Brown, 3 Cro. El. 803. A. Fazakerley v. Wiltshire, 1 Str. 468, 469. A. Winton v. Wilks, 2 Ld. Ray. 1129. D.

149. A custom that none not free of the guild shall exercise the occupation of a weaver in London is not violated by one of Hackney coming to London, receiving silk there, and returning with and weaving it at Hackney, and when wove carrying it back again to London, and then receiving his salary.

150. Or that no foreigner shall buy of a foreigner by retail. Foreign bought, &c.

151. Or that no freeman shall employ or set to work at any manual occupation within the municipality or its liberties any foreigner to the freedom of the municipality — without saying for hire or gain. Freemen not to employ foreigners.

The next class of customs are those which give the Corporation a greater authority over the freemen and inhabitants, than what they possess under modern institutions.

152. There may be a custom that certain companies, members of the Corporation, have a livery consisting of certain freemen appointed to the office; that the freemen are liable to serve, and that the court of mayor and aldermen have jurisdiction over the livery. Livery.

153. Or that the Corporation shall have the regulation of carts or of portage within the municipality. But Carts.

(149) *Weavers of London v. Brown*, 3 Cro. El. 803.

(150) *City of London's Case*, 8 Co. 125. a. *Dyer*, 279. p. 10. *R. v. Dublin*, Palm. 3.

(151) *Bosworth v. Budgen*, 7 Mod. 459.

(152) *Vintners v. Clerke*, 5 Mod. 157. 320. S. C. Comb. 412. S. C. 12 Mod. 114.

(153) *Player v. Jones*, 1 Vent. 21. *Broadnax Ca.* 1 Vent. 196. *Fazakerley v. Wiltshire*, 1 Str. 468.

this extends only to carts used for hire, and not those of private persons, used for their own business; and so to public porters, and not to a person employing his own servants.

Entertain-
ment.

154. Or that a steward of a company shall give an entertainment to his electors on the day after his election.

There is another class of customs, by which a Corporation or its officers are invested with more ample powers of punishing the violations of its privileges, customs, or by-laws, than a charter can bestow.

Informa-
tion.

155. As that the common serjeant (of London) may file an information in the city court, against a freeman who has assaulted an alderman in the discharge of his office; but such an information cannot be filed for using disrespectful words to an alderman at that time.

Jury.

156. Or for the steward of the manor to nominate the jury who are to serve upon the court-leet at the election of the mayor of the borough.

Distress.

157. Or that the Corporation may distrain the goods of the offender, and detain them until he shall pay the fine, if he refuse to pay it on demand. But it must be a power of distress according to the common law, under which enough may be taken to secure payment of the fine, and if there be but one article sufficient, that may be detained although of infinitely greater value, as a

(154) *Framework Knitters v. Green*, 1 Ld. Ray. 113. V. Cro. Jac. 555. Lut. 1320.

(155) *R. v. Rogers*, 7 Mod. 29. S. C. 2 Ld. Ray. 778.

(156) *R. v. Joliffe*, 3 D. R. 242.

(157) *Pierson v. Ridley*, T. Ray. 204. *Moir v. Munday*, Say. 183.

diamond worth a thousand pounds, to secure a penalty of a few shillings, if there be not sufficient besides. Yet the power of distress cannot be excessive. Therefore, if the custom be to seize *all* the offender's goods, exposed to sale, in violation of the custom, it is void. A custom to distrain must be clearly shown; it cannot be presumed from a custom to impose a fine.

158. Or to seize as forfeited goods, foreign bought and foreign sold, or the goods which a foreigner offers for sale within the municipality, in violation of a custom. — But quære as to the former, for this would punish the buyer, who cannot know a foreigner from a freeman.

Forfeiture
by foreign-
ers.

159. Or to seize as forfeited, all goods of a particular kind (as bread) fraudulently and improperly made. Or that the chief officer of the company to which the offender belongs, may seize goods so made and exposed to sale, and carry them to the Guildhall; that a jury shall be empannelled, and that the goods shall be destroyed if found to be bad and unserviceable. Under such a general custom, the chief officer of a modern company, member of an ancient Corporation, may search for and take such goods to be examined.

Forfeiture
of unsale-
able goods.

160. Or for the court of the Corporation (as that of mayor and aldermen in London) to fine a freeman for an assault on a member of the same court, although he is one of the judges. That is, if he be one of several judges, as an alderman; for the court is competent to try the charge, although the aldermen assaulted retire

Fine for as-
sault on a
Judge of the
Court.

(158) *Jollie v. Broad*, 2 Rol. 202. Custom of York, Bendloe, 35. City of London's Case, 8 Rep. 126. Chamberlain of London v. Compton, 7 D. R. 597. *Cudden v. Estwick*, 1 Salk. 192. S. C. 6 Mod. 123. *Fazacherley v. Wiltshire*, 1 Str. 469.

(159) *Palmer v. Barfoot*, 2 Lutw. 1375. *Bolton v. Throgmorton*, Skin. 55.

(160) *R. v. Rogers*, 2 Ld. Ray. 777.

from the Bench, which he must do, for he cannot be judge in his own cause. But it cannot try a charge preferred for an assault upon their head officer, where his presence is necessary to constitute the court; as if the mayor of London be assaulted, and the court incomplete without him, for he cannot preside there during the trial of his own cause.

Fine, marrying orphan ward.

161. Or for the mayor and aldermen (London), who have the custody of orphans within the city, until the age of 21 years, or marriage, and who hold a court of record, called the Court of Orphans; with power to give licence to marry their female orphans, or deny it upon a reasonable cause—to impose a reasonable fine (to be paid to the court) upon any one who marries a ward of the court, without their licence, and to commit him to prison, on refusal to pay or give security for the fine. And this custom binds a stranger beyond the city, who marries an orphan in a foreign county, although without notice that she is a ward of the court, for he ought to enquire. But where there is no disparagement in the marriage, the Court of King's Bench will discountenance their levying the fine.

Imprisonment.

162. There may be a custom that one who has elained an orphan, the ward of a prescriptive court shall be liable to imprisonment by order of that court, until he discover where she is concealed.

Imprisonment, refusing livery.

163. Or that if a freeman of the company be chosen of the livery, and refuse the office without a reasonable excuse, complaint has been made by the master and wardens of the company to the Court of mayor and

(161) Harwood's Case, 1 Vent. 179. S. C. 1 Mod. 77. 80.

(162) Williamson v. Bolton, T. Ray. 117.

(163) Vintners v. Clerke, 5 Mod. 157. 320. S. C. 12 Mod. 114. S. C. Comb. 412. R. v. Merchant Tailors, 2 Lev. 200. Grafton's Case, 1 Mod. 10.

alderman of the Corporation, and they have commanded the freeman chosen to take upon him the office; and that if he then refused, the Court has used to commit him to the custody of their officer, until he has consented to undertake it. But the committal must be for contempt of the Court: there cannot be a custom for the company to commit their freemen who refuse the livery. —I have introduced this and the following paragraph, because, though every Court of record may commit for a contempt in disobeying its lawful commands, yet these committals seem to require the support of a custom.

164. Or that if a freeman forestall fish coming to any market in the city, the court of aldermen on complaint, may after his appearance and confession, ordain that he shall desist from such forstalling, and that if he will not promise to obey, but declare that he will not obey their order, the Court may commit him (for the contempt of Court) until he signify to them that he will conform himself. In such case it is not necessary that the complaint should be upon oath.

Forestalling, or rather contempt. &c.

165. Or to commit one elected to be sheriff, if he refuse to take the usual oath, or one elected alderman for refusing the office.

Refusing shrievalty, &c.

166. A custom by which a foreigner incurs a penalty of 6s. 8d. for trading in the municipality contrary to a custom of exclusion, is reasonable, although disproportionate to the value of the goods which were the subject of the offence.

Penalty.

(164) *London v. Coates*, 1 Vent. 115.

(165) *Id.* 1 Vent. 116. *Grafton's Case*, 1 Mod. 10.

(166) *Moir v. Munday*, Say. 182.

To whom. 167. The fine for breach of a custom, may go to the bailiff, and if the name be altered to mayor, he may recover it in the new name.

Only in prescriptive Corporations. 168. Customs can exist only in a prescriptive Corporation; but they do not cease on an alteration of the name: as long as the prescription continues, a custom may be laid in the municipality; but when the prescription ceases, the custom is determined. But a custom of a prescriptive Corporation may extend to franchises newly acquired by companies recently incorporated into it.

To liberties and suburbs. 169. If there be a custom in a city, it extends to the liberties and suburbs of the city. At least the Court will not presume that the liberties and suburbs are beyond the city; for although they take judicial notice of counties, they take no notice of the extent of cities and towns otherwise than as they appear on the record.

New franchise. 170. If a new franchise (as the shrievalty of Middlesex) be conferred upon an ancient Corporation (as London), and they are bound to find a proper officer to execute the duties belonging to it, the customary power of levying a fine for refusal of the office of sheriff of the municipality may be exercised to compel a freeman to undertake the office in the new franchise. So also may they make by-laws for the regulation of such office by virtue of their customary power to make by-laws for the city.

(167) *Moir v. Munday*, Say. 183. Custom of York, Bendloe, 35.

(168) *Vaughan v. Lewis*, Carth. 228. Custom of York, Bendl. 35. V. tit. 3. 4. *Bolton v. Throgmorton*, Skin. 55. Sed vid. *Chamberlain of London v. Compton*, 7 D. R. 602. V. tit. 171.

(169) *Colchester v. Goodwin*, Cart. 122. *Bosworth v. Budgen*, 7 Mod. 459. *R. v. Ipswich*, (Gippi') 2 Ld. Ray. 1240. *Harris v. Wakeman*, Say. 255. *London v. Vanacre*, 12 Mod. 272.

(170) *London v. Vanacre*, 12 Mod. 272. S. C. 1 Ld. Ray. 499.

171. Where in a prescriptive Corporation the masters of the companies have power to seize unmarketable goods exposed to sale by their freemen, and carry them before the corporate court to be examined, and if proved unmarketable, destroyed, this custom will extend a similar power to masters of companies newly incorporated into the ancient municipality.

New Companies.

II. VOID CUSTOMS.

172. But customs in themselves unreasonable and in violation of the common law, without appearing to have had their origin in public policy, will not be allowed to continue on account of their antiquity, or although an act of parliament has in general terms confirmed the customs of the place; for such a confirmation cannot be construed to extend to the establishment of usages derogatory of public rights.

Not saved by a general confirmation by statute.

173. On this ground a custom is void which empowers the imposing of a penalty on a township, and making it leviable upon any individual who inhabits within it.

Fine on town leviable on individual.

174. So is a custom for the steward of a manor to make by-laws with the consent of the homage; for the homage alone have the right of making laws for their own government.

Steward to make by-laws.

175. Or a custom to proceed against a freeman, who has spoken opprobrious words of an alderman by infor-

Information for slander.

(171) *Palmer v. Barfoot*, 2 Lutw. 1375. *Bolton v. Throgmorton*, Skin 55.

(172) *Hamburgh Comp.* 1 Mod. 212. in notis.

(173) *Wells v. Cotterell*, 3 Lev. 49.

(174) *Id.* 3 Lev. 48.

(175) *R. v. Rogers*, 7 Mod. 29.

mation filed by the common serjeant in the court of the mayor and alderman ; because the common law does not permit such a proceeding for such an offence.

Punish-
ment for
slander.

176. Or a custom to disfranchise and commit for such an offence; for the punishment is unreasonable: a fine is sufficient for which there may be a good custom. It is said, it may be to fine and imprison him.

Present-
ment by
leet jury.

177. Or that the jurors of a court-leet shall enquire of offences at one court, and present them at the subsequent court; for the purpose of such courts is the expeditious remedy of minor offences, which is inconsistent with this manner of proceeding.

Certificate
of custom.

178. Or a custom by which a Corporation would be made judges in their own cause; as that the Corporation of London may certify to the Courts of Westminster Hall, by their recorder, a custom which is in issue between the Corporation itself and a stranger, or even "one of its members," in a cause where there is a disputed claim between them, such as a toll claimed by that custom; or where the issue concerns the Corporation, though not directly a party to the suit. According to this rule, although the Corporation returns a custom to exclude strangers, it ought to be tried by a jury, and not by certificate.

Judgment
before ap-
pearance.

179. Or a custom for the Court to proceed in a manner inconsistent with natural justice and the common

(176) *R. v. London*, 2 Lev. 201. *Clark's Case*, 1 Vent. 327.

(177) *Davidson v. Moscrop*, 2 East, 63.

(178) *Day v. Savage*, Hob. 86. *City of London's Case*, 8 Rep. 123. *Hesketh v. Braddock*, 3 Bur. 1857. Doc. & Stu. c. 10. p. 34.

(179) *Williams v. Bagot*, 3 B. C. 786.

law. As, by issuing a summons and attachment at the same time, returnable at the same time, dispensing with personal service and allowing the declaration to be filed and judgement to be obtained by default, before an appearance has been entered.

180. Or to try an action by six jurors instead of twelve. Jury.

181. It was said by Holt, Chief Justice, that the Corporation of London may create a company; but he seems to have treated a company as little more than a voluntary association, for he defines it "not to be a Corporation, but a brotherhood or club to meet and drink, and talk together, that's all." But in a case long anterior it was held, that the custom of London to create Corporations is void, and this opinion has been recently confirmed. In another case it was held that they could create such a company as that of the free porters, and there is no reason to doubt this power, for such a company is a mere association of their servants, without power to make by-laws even for their own government, and which the Corporation may again modify or dissolve without their assent.

Create
Company.

III. CUSTOMS ENFORCED.

There are two methods of enforcing customs for the exclusion of foreigners: the one is by bringing an action on the case founded upon the violation of the custom; the other by making a by-law in pursuance of

By action
or by-law.

(180) *Tredymmock v. Perryman*, Cro. Car. 259.

(181) *Robinson v. Groscott*, Comb. 373. *Cudden v. Estwick*, Salk. 192.

143. *Fazakerley v. Wiltshire*, 1 Str. 462. *Case de Tanistry*, Davis. 33.

R. v. Coopers of Newcastle, 7 T. R. 548.

the custom, and bringing an action to recover the penalty imposed by the by-law. The latter is the more general practice, but the former is preferable.

Action by
the Corpo-
ration.

182. If the custom be general that no foreigner shall exercise any trade or occupation, or that no freeman shall employ any foreigner in his trade or occupation within the municipality, the violation of this custom is an injury to the whole Corporation, and the action on the case may be sustained in the name of the Corporation, or of their treasurer or chamberlain for their benefit. But it cannot be sustained by any others, whether members of the Corporation or strangers.

By an an-
cient Guild.

183. If the exclusion be that no one shall exercise trade, &c. except he be free of a certain guild, the action can be brought in the name of that guild only, and not of the municipal Corporation, unless the declaration show the identity of such guild with the Corporation.

By the
Guild of the
particular
trade.

184. If the custom be that no foreigner shall exercise any particular occupation, as that he shall not use the art or mystery of a weaver, merchant-taylor, or shoemaker within the municipality, if there be guilds of weavers, merchant-tailors, and shoemakers, the action against a foreigner for using the art of a weaver, merchant-taylor or shoemaker, must be brought in the name of the guild whose art he uses, and cannot be sustained

(182) Chamberlain of London's Case, Co. 63. Bodwic v. Fennel, 1 Wils. 235. 237. Hesketh v. Braddock, 3 Bur. 1847. Berwick v. Johnson, Loft. 337. Chamberlain of London v. Compton, 7 D. R. 597. York v. Welbank, 4 B. A. 438.

(183) Wilton v. Wilks, 2 Ld. Ray. 1134. S. C. 6 Mod. 21.

(184) Weavers of London v. Brown, Cro. Eliz. 803. Bodwic v. Fennel, 1 Wils. 235. Hesketh v. Braddock, 3 Bur. 1847. Woolley v. Idle, 4 Bur. 1951. in B. R. 7 Geo. 3.

in the name of the Corporation or its chamberlain or treasurer.

185. Directly contrary to these cases, however, was *Contra.* decided, the case of the Taylors of Bath, in which it was held that the company of taylors could not maintain the action, but that it must be brought in the name of the municipal Corporation. The circumstance in which it differs from some of the former cases is, that none could follow the trade there unless free, both of the Corporation and the Company, which is still stronger against it, and assimilates it more to the case of the Weavers of London.

186. If the action be brought by the municipal Corporation, it cannot be tried in their court; for they would in such case be both party and judge, and empowered to notice the validity of a custom, the establishment of which is for their own advantage. When such a custom comes in question, I apprehend that the Court of London cannot certify it, but that it must be tried by a jury, and, therefore, that they are not competent to determine on it at the suit of the chamberlain, for the right of the Corporation itself is adverse to that of the defendant. But it is impossible to reconcile the cases upon this point; the last which has come to my notice is against allowing the Corporation to judge of the custom. In Hesketh's case it was determined that sheriffs who are freemen cannot empanel a jury, that

When cannot be in Corporation Court.

(185) *Taylors of Bath v. Glazby*, 2 Wils. 266. in C. B. 5 Geo. 3.

(186) *Chamberlain of London's Case*, 5 Rep. 63. *London v. Green*, 8 Mod. 212. *Harris v. Wakeman*, Say. 255. *Player v. Archer*, 2 Sid. 121. Andr. 104. *Day v. Savadge*, Hob. 86. *Bodwic v. Fennel*, 1 Wils. 235. *Hesketh v. Braddock*, 3 Bur. 1853. *Player v. Vere*, T. Ray. 293. 328. *Fazakerley v. Wiltshire*, 1 Str. 469. *City of London v. Wood*, 12 Mod. 689. *York v. Wellbank*, 4 B. A. 438.

freemen cannot be jurors in a suit on such a custom, or witnesses in support of it. And justice is clearly in favour of excluding these suits from the Corporation court, as well when the chamberlain, as when the Corporation is plaintiff. Yet it has been the constant practice, when such customs have been allowed and the by-laws held good, to award a procedendo to the courts of London. On this point Lord Mansfield observed, in *Hesketh v. Braddock*, that it was "the first case where the objection had been taken upon the record." It was, however, raised on argument in the case of *Player v. Vere*, where perhaps the Court did not consider it tenable; for though the "by-law made the penalty recoverable in the City Court," it was declared to be good in all respects except the reservation of a rent, on which the case was decided; but the argument from cases of procedendo is inconclusive. In the case of the *City of London v. Wood*, it was observed by Holt, C.J. that if such an exception be taken in Westminster Hall, "it does not hinder a procedendo, because it is an error in the proceeding; for the habeas corpus is only to know the cause of detainer of the party in custody, and what is then to be judged of is only the return of the by-law; and if that be good we must remand: for to enter into an examination of the proceedings would be to preclude the plaintiff before his time."

When it
may be in
Corpora-
tion Court.

187. If an action be brought in the name of a company on the violation of a custom which excluded foreigners from following their trade, the injury being to the company alone, and not to the municipal Corporation, the suit may be properly entertained in the courts of the municipality, which has cognizance of its own customs.

IV. CUSTOM PLEADED.

188. In proceeding upon a custom, it must be shown that the Corporation is prescriptive; for a custom cannot exist in any other. But it may be laid in the Corporation "time out of mind" in its present name, without mentioning its former. Prescriptive Corporation.

189. A custom against common right must be set forth with the greatest precision, and fully; it is insufficient to state that there has been a custom that no person should exercise any trade or occupation within the place unless free of a certain guild, "or otherwise authorized according to the manner of the city;" but it ought to set out particularly in what the other authority, according to the manner of the city, consisted. Custom set forth precisely.

190. But a custom may be set out in words which do not assert usage. It may be averred that there is a custom that infants "may" bind themselves apprentices, or that freemen "may" alienate in mortmain, without saying that they "have used and been accustomed" to do so. Words not asserting usage.

191. It is necessary only to declare upon or plead such custom as will maintain or defeat the action. If there be reciprocal customs, mutual actions will lie, and the party need only set forth that by which he is supported. How much of the custom.

(188) *R. v. Knight*, 4 T. R. 430. Custom of York, *Bendloe*, 35. *Fazakerley v. Wiltshire*, 1 Str. 465.

(189) *Wilton v. Wilks*, 2 Ld. Ray. 1135. *Horn v. Chandler*, 1 Mod. 271. *Eden*, 2 M. S. 229.

(190) *Windhurst v. Gibbs*, T. Ray. 4.

(191) *Griffith v. Williams*, Say. 57.

If, therefore, a custom be averred in the Corporation to keep the prisons in repair, and another for every inhabitant who is not a burgess in consideration of the former, to pay the Corporation twenty shillings, it is sufficient in an action, for the defendant, being an inhabitant and not a burgess, to traverse the latter custom without noticing the former; and if the traverse be found for him he must have judgment.

The exceptions must be shewn.

192. But the entire custom must be set forth, together with all the exceptions in it; and if the evidence show exceptions not set forth with the custom, it is not proved as it is laid.

Other customs shewn.

193. Where a custom is shown to commit for contempt, until the offender shall submit himself to the court, it should appear that it is a court of record, and that it is held frequently, and at what intervals, to show that he has an opportunity of making his submission.

When not pleaded in the Municipal Court.

194. In proceedings in the court of the municipality, the custom ought not to be set forth; for the judges of the court must take judicial notice of them, as the judges at Westminster Hall take notice of the common law; for such customs are the *lex loci*, and the rule on which the court is bound to decide.

On Error.

195. For this reason, on a writ of error, the Court of King's Bench will take judicial notice of all the customs of the place from which the cause is brought up.

(192) *Ipswich v. Johnson*, 2 Barnard. 120. *Ex parte Eden*, 2 M. S. 229.

(193) *London v. Coates*, 1 Vent. 116.

(194) *Day v. Savadge*, Hob. 86.

(195) *Anon.* 11 Mod. 68. *Spink v. Tenant*, 1 Rol. 106.

196. In pleading a custom, the form of averment is *tempore "cujus contraria memoria non,"* &c. The phrase "*tempore quo non extat memoria*" is nonsense.

Time im-
memorial.

197. An averment, in a return to a mandamus to admit, that there has been a certain ancient court held in the city; for such admission is sufficient, without showing at what time or in what part of the city; for members of the city although not freemen, are presumed to know both the time and place at which their own courts have been accustomed to sit.

What need
not be
shewn.

198. When a custom is set forth, it must be shown that the party is within the operation of it; and if it relate to particular classes only, it must be shown that he is of one of them; for the contrary will be otherwise intended, and the Court will not allow a defect of this kind to be amended on a return to the writ of habeas corpus.

Must shew
the party
within it.

199. In proceedings in a municipal court, if a custom of the place be pleaded, the opposite party must demur, and not join issue upon it; for it is the *lex loci*. Indeed, it ought not to be pleaded.

When issue
not taken
on custom.

(196) *Phips v. Jackson*, 6 Mod. 305. Co. Lit. 115.

(197) *R. v. Bosworth*, 2 Str. 1112.

(198) *Ex-parte Eden*, 2 M. S. 230.

(199) *Day v. Savadge*, Hob. 86. V. tit. 194.

V. CUSTOM PROVED.

By certifi-
cate.

200. The manner of proving a custom of London, in suits between parties within it, when brought before the superior Courts, and the Corporation is not a party, is peculiar to this city. The court of mayor and aldermen are to examine the custom, and when they have found it, it is for them to direct their recorder, who with a certain ceremonial, as the organ of the Corporation, certifies it verbally to the Courts of Westminster Hall, after which, it becomes matter of record in the Court to which it was certified, and thenceforth they take judicial notice of it, and after it has been once certified, never allow a second certificate.

Notice on
motions.

201. Of some customs of London the Court will take judicial notice, on motions on affidavit, when disputed by neither party, although they have never been certified.

In Chan-
cery.

202. If a question arise in the Court of Chancery, on a custom of London, the Chancellor issues an order to the Corporation, to enquire if there be such a custom, to which they make a return.

Sufficiency
of certifi-
cate.

203. A return by the Corporation that they cannot find any instances of the custom referred to them, is sufficient, and amounts to a certificate that there is no

(200) *Strata Marcella*, 9 Co. 31. b. *Plummer v. Bentham*, 1 Bur. 248. *Day v. Savadge*, Hob. 87. *Blacquiére v. Hawkins*, Doug. 365. *Hartop v. Hoare*, 2 Str. 1187.

(201) *Argyle v. Hunt*, 1 Str. 187. *Hartop v. Hoare*, 2 Str. 1188.

(202) *Piddington v. Main*, *Moseley*, C. C. 6, 7.

(203) *Anon. Moseley*, C. C. 7.

such custom. But a return that it does not appear whether there be such a custom or not, is insufficient ; and if a proper return be not made on a day given, the Court will impose a fine upon the city.

204. The chancellor will not inspect the books, to ascertain whether there be such a custom, although submitted to his inspection, for the method of trying it is by certificate from the mayor and aldermen. Court will not inquire from books.

205. But in cases where the Corporation is a party, it seems that the customs of London, if the gist of the action, must be tried by a jury, as those of any other place ; for if a certificate were allowed, the Corporation would be judge in their own cause. But that the Court will judicially notice them, in a suit against a foreigner, if they have been already certified by the recorder. Customs of London tried by a jury.

206. Customs and prescriptions can be tried only in the courts of common law ; and the courts of Westminster, will not take judicial notice of municipal customs, but they must be pleaded and put in issue, that their existence may be tried by a jury. Of other Municipalities.

207. The Corporation of London on habeas corpus, must return its customs as well as its by-laws. The contrary doctrine was once asserted, but rejected by the Court, which will not notice the custom unless it appear upon the return. Return on habeas corpus.

(204) Anon. Moseley, C. C. 7.

(205) Day v. Savadge, Hob. 87. Blacquiere v. Hawkins, Doug. 365. Hesketh v. Braddock, 3 Bur. 1853. V. tit. 178. and 186.

(206) Day v. Savadge, Hob. 87. Hartop v. Hoare, 2 Str. 1187. Blacquiere v. Hawkins, Doug. 365. Hodgson v. Atkinson, Comyns, 603.

(207) Watson v. Clerke, Comb. 139. V. tit. By-laws Enforced, post.

Proof by
usage.

208. Evidence that persons have been frequently fined for keeping shop without licence from the Corporation proves the right to such fines, on which an action may be sustained ; but perhaps it does not show an arbitrary power in the Corporation to exclude all foreigners from erecting shops in the municipality.

As averred.

209. A custom must be proved precisely as it is averred, particularly if against common right. If it be laid without exceptions, and on the evidence it appear that there are exceptions, the averment is not sustained.

Antiquity of
usage.

210. Evidence of usage for twenty years uncontradicted and unexplained, has been held sufficient when the custom was not contrary to public policy.

No discontinuance.

211. Disuse for twenty or thirty years does not destroy or abolish a custom ; for it is not necessary to show its constant continuance, and frequent exercise. But by constant omission to enforce a custom or privilege granted by statute, of excluding foreigners from using their trade or occupation within the municipality, it may be released ; for being a privilege and advantage to the Corporation in particular, they have power to relinquish it, and that they have done so, will be inferred from foreigners having long continued to use their trades and occupations in the place without molestation.

No indictment on.

212. It is not an indictable offence, for foreigners to trade or follow their occupations within a municipality,

(208) *Ipswich v. Johnson*, 2 Barnard. 120.

(209) *Id. ibid.*

(210) *R. v. Joliffe*, 2 B. C. 59. S. C. 3 D. R. 242.

(211) *Colchester v. Goodwin*, Carter, 118. *Berwick v. Johnson*, Loft. 338.

(212) *R. v. Sharpley*, 4 T. R. 777.

contrary to a custom excluding them, although there be a by-law in affirmance of the custom.

213. If goods be distrained or seized by the officer of a Corporation, under pretence of a custom which is void, the owner may maintain an action of trespass against him who seized them; for it is a trespass *ab initio*. So if the custom would have warranted a distress, but is void on account of the excess.

Trespass
for seizure
under void
custom.

The manner of enforcing customs by making a by-law, in affirmance of them, will be considered under the title By-law, as will also the manner of returning customs upon the writ of habeas corpus from the city of London. The consideration of such as relate to the powers of making by-laws, the rights of admission, election, and amotion, will fall more properly under these titles; for which reason they are not introduced in this place.

SECTION II.

REGULATIONS BY CHARTER.

The second class of ordinances, are those introduced by the charter of incorporation, confirmation, or revival, by which the king imposes upon the body politic those regulations which appear to be expedient, and to which by acceptance of the charter they implicitly submit themselves. Nothing contrary to the common law, can be prescribed in this manner; but any thing consonant with that and the nature of the municipal institution, may be so prescribed.

Regulate
incidental
powers.

214. The charter may therefore divest the body at large of its incidental powers, and confide them to select classes, created by the crown; such as the rights of election, amotion, and making by-laws, of disposing of property, and transacting all business of the Corporation, both as regards members and those who are strangers to it.

Subsequent
regulations.

215. But municipal Corporations are not subject to any founder. The king may to a certain purpose, be considered their founder, in as much as he can prescribe ordinances on the incorporation; but after the body is once incorporated, he cannot make any alteration in the existing regulations, or add any new, unless the Corporation assent by accepting a new charter, in which such regulations are contained.

It were quite vain to enumerate the regulations which a charter may impose; but many of them will be necessarily alluded to in the following pages; it is sufficient therefore, in this place, to point out some restrictions which the constitution has imposed upon the prerogative with regard to its power of incorporation.

Cannot
alter regu-
lations by
statute.

216. A charter cannot introduce an alteration in the rules which have been prescribed to a corporation by act of parliament; but it may introduce any kind of alteration in a Corporation existing either by prescription or charter, or by reason of both.

(215) Anonymous, 3 Salk. 102.

(216) R. v. Miller, 6 T. R. 277. R. v. Haythorne, 5 B. C. 425.

217. It cannot exclude foreigners from following their trade or occupation within a municipality, or empower to impose a penalty for doing so. Foreigners.

218. Nor ordain that no one shall practise his trade there, unless he has served an apprenticeship to it, or been approved by the Corporation or some of its members. Apprenticeship.

219. Nor that he shall not sell by retail within a municipality. Sale by retail.

220. Nor that a foreigner shall not sell to a foreigner. Foreign bought, &c.

221. Nor can it create a forfeiture of goods, foreign bought and foreign sold, nor of the goods of those not free, trading in the place, although alien merchants. Forfeiture.

222. Nor a forfeiture of the goods of one who violates the privileges or ordinances of the Corporation.

223. Nor a forfeiture of goods improperly prepared within the municipality. If a grant be made to a mayor and commonalty, that the mayor shall have "plenum et integrum scrutinium, gubernationem et correctionem, omnium et singulorum mysteriorum," &c. without grant-

(217) City of London's Case, 8 Co. 125. a.

(218) R. v. Churchwardens of Thame, 1 Str. 116. Bedford v. Fox, 1 Lutw. 564.

(219) Berwick upon Tweed v. Johnson, Loft. 338.

(220) R. v. Dublin, Palm. 3.

(221) R. v. Dublin, Palm. 4. 8. City of London's Case, 8 Co. 125. a.

(222) Horne v. Ivy, 1 Vent. 47. S. C. 1 Mod. 18.

(223) City of London's Case, 8 Co. 125. a. Dr. Bonham's Case, 8 Co. 119. a.

ing them any court in which legal proceedings may be instituted; it gives a power of search to discover offences and defects, which may be punished according to law in any court: but it neither gives nor can give them any irregular or absolute power to correct or punish any at pleasure.

Imprison-
ment.

224. Nor can it give a power to imprison any for violating their privileges or ordinances. It is incident to every court created by letters patent or act of parliament, and other courts of record, to punish any misdemeanor done in court, in disturbance or contempt of the court, by imprisonment. But they cannot by any implied authority for any such misdemeanor commit him to prison without bail or mainprize, until he shall be delivered by command of the president and censors.

225. If the charter give a power of making an unreasonable by-law, it is in this respect void; and although it have not been repealed, advantage may be taken of the want of authority in an action upon the by-law.

It may be proposed as a general rule, that whatever can be introduced by a by-law may be prescribed by a charter.

(224) *Kirk v. Nowill*, 1 T. R. 124. *Dr. Bonham's Case*, 8 Co. 119. a.

(225) *Tailors of Ipswich*, 1 Rolle, 5. *Sackville College Case*, T. Ray. 178.

STATUTE.

226. It is quite unnecessary to say what privileges may be granted, or regulations prescribed to a Corporation, by an act of parliament ; for the power of the legislature in this respect, cannot be defined. A statute does not by implication invest the body with any extraordinary authority, if it be intended that any shall be given, it must be by express words to that effect.

227. The regulations prescribed by a statute can be altered neither by the Corporation themselves making a by-law for that purpose, nor by acceptance of a charter from the crown, affecting to introduce such alteration. This rule is so strict, that even the form of election prescribed by a statute is unalterable.

228. But the privileges conferred by a statute, may be waived by a by-law ; as if strangers are excluded from trading within the municipality, the Corporation may relinquish the privilege, and from long usage a by-law may be presumed.

SECTION III.

BY-LAWS.

The third kind of ordinances is that of by-laws, which every Corporation has an incidental power of making for the regulation of their municipal affairs. This power

(226) *Kirk v. Nowill*, 1 T. R. 124.

(227) *R. v. Miller*, 6 T. R. 277. *R. v. Haythorne*, 5 B. C. 423.

(228) *Berwick upon Tweed v. Johnson*, *Lofft*. 338. V. tit. 211.

has been compared to the legislative authority of a republic, or more quaintly to the reason of a man, by which he lays down rules for his own government: both these comparisons have more of imagination than reality. The legislative functions of a Corporation are confined within a very narrow compass, the general laws of the kingdom having ascertained the rights of person and property of all individuals, and the form of their constitution, whether by custom or charter, having in most cases prescribed invariable rules for their conduct in a corporate capacity.—The subject will be treated under the following subdivisions :—

- I. Who may make by-laws.
- II. Who are bound by them.
- III. What by-laws are valid or void.
- IV. By-laws in affirmance of a particular custom.
- V. How by-laws shall be construed.
- VI. How enforced.
- VII. And how pleaded.

I. WHO MAY MAKE BY-LAWS.

Body at
large.

229. The power of making by-laws is incidental to a Corporation, and it is unnecessary that the charter contain an express provision for this purpose. When no provision is made by the charter, as to the persons by whom this power is to be exercised, like every other incident, it belongs to the body at large; and every member from the head officer to the common freeman has an equal right to vote.

(229) *Norris v. Staps*, Hob. 211. *R. v. Maidstone*, 3 Bur. 1837. Com. Dig. Fran. F. 10.

230. When the incidental power remains undisturbed, it can be exercised only by a corporate assembly consisting of every class duly convened.

Corporate
assembly.

231. If a charter expressly confer on a company a power of making by-laws in particular case, it abridges the incidental power and restrains their authority to the particular cases mentioned. But this was only an observation made in the case, and not important to the decision. It may be very doubtful, if this be the law, whether it will extend to a municipal Corporation.

Power re-
strained
charter.

232. The charter may divest the body at large of this power, and repose it in a select class appointed by the king to exercise it. And in many prescriptive Corporations, it is equally exercised by a select body to the exclusion of the commonalty.

Select body.

233. When the charter vests the power of making by-laws in all cases in a select body, the incidental right is taken away, and the other members of the body are excluded. Except as to regulating any particular franchise which may still remain in them; as if the Corporation consist of mayor, aldermen, and commonalty, and the general power of making by-laws is vested in the mayor and aldermen; the commonalty are in all cases excluded, unless the right of electing aldermen or freemen remains in them; in which case as incident to the right of election, they have the power of making by-laws for regulating the manner in which that particular right shall be exercised.

Incidental
right di-
vested.

(231) Child v. Hudson's Bay Company, 2 P. Wms. 208.

(233) R. v. Head, 4 Bur. 2521. Hoblyn v. Regem, 6 Bro. P. C. 519.
R. v. Westwood, 4 B. C. 799. 818.

In particu-
lar cases
only.

234. If the charter confide to a select class the power of making by-laws in certain instances only, leaving others unprovided for, the power of the select body is derived wholly from the charter, and confined to making by-laws in these particular cases; the power of doing so in all other instances remaining undisturbed in the body at large, by virtue of their incidental right, particularly if the power of the select body is derived from a new charter, in derogation of the ancient right of the body at large to make by-laws in all cases.

Who must
join.

235. Where the power of making by-laws is in a select class, if any others join them in the exercise of it, the by-law is void; as if it be vested in the mayor and aldermen, and the burgesses or commonalty join them in making the by-law. For when others interfere, the by-law may be carried perhaps by a majority of the persons voting, contrary to the opinion of a majority of, or all the persons to whom the power is confided.

Select body
in name of
body at
large.

236. But where the select body, as mayor and aldermen, is empowered to make by-laws "instead, for, and in the name of the mayor, aldermen and burgesses," if a by-law purporting to be made by the mayor, aldermen and burgesses be found by the verdict "to be in due manner made," it will not be assumed that the burgesses joined in making this by-law, which would avoid it; but that the mayor and aldermen alone, acting in pursuance of their authority, made it in the name of the mayor, aldermen and burgesses.

(234) *R. v. Westwood*, 4 B. C. 800. 813.

(235) *Parry v. Berry*, Comyns, 269. *R. v. Head*, 4 Bur. 2521. *R. v. Westwood*, 4 B. C. 799. *Bedford v. Fox*, 1 Lutw. 564.

(236) *Green v. Durham*, 1 Bur. 131.

237. It may be observed that whatever body has power to make a by-law has equal authority at any future time to repeal it; this is incident to the power of making it.

Power to
repeal.

238. There is some difference in the extent of the powers of a select body and the Corporation at large, in making by-laws, which will appear by reference to by-laws made in relation to the power of election of officers and members; but this has arisen from a departure from the principle of law, that a Corporation cannot alter the form of its constitution.

Difference
in powers of
body at
large and
select body.

239. When a new charter, which is void, assumes to incorporate a place where there is an existing Corporation, and includes the members of the ancient Corporation together with new men, if a sufficient number of the ancient corporators professing to act under the new charter, without any of the new men joining, make a by-law which they are capable of making under the ancient constitution, their act is referred to their genuine authority, and not to the new charter, and the by-law will be held good. I presume it is not valid, unless all the old members are reincorporated; for otherwise the remainder are deprived of the right to be present, which would avoid any corporate act.

Under new
void char-
ter.

But if any of the new men, although a minority, join in making the by-law, it is void; for such act cannot be referred to the original authority, and their votes may have helped to carry the question against a majority of the old members.

(237) *R. v. Ashwell*, 12 East, 29. *R. v. Westwood*, 4 B. C. 806.

(239) *Buller v. Palmer*, 1 Salk. 191.

Guardians
of the peace.

240. Guardians of the peace by prescription, such as the officers of some Corporations anciently were, cannot, as such, make regulations imposing a penalty.

Companies.

241. The freemen of companies members of a Corporation may make by-laws for the regulation of their own affairs, and when an authority is necessary which the companies cannot give, the Corporation may make regulations for them; but by-laws made by the latter will bind only such members of the companies as are likewise freemen of the municipality, except in cases where they derive force from the local jurisdiction.

By custom.

242. A general custom to make by-laws does not empower to make any which are contrary to common right, or which would not be valid if made under the incidental power in all Corporations, or the power conferred by a modern charter.

Concerning
a foreign
franchise.

243. A Corporation may make by-laws as well for the regulation of any franchise conferred upon them, either at their creation or by subsequent grant; as for the regulation of the municipality. And the same persons must join in making it in both instances.

II. WHO BOUND.

Freemen.

244. With regard to the regulation of corporate franchises, rights, and liabilities, the freemen only can be bound even by ordinances of a municipal Corporation;

(240) *Dodwell v. Oxford*, 2 Vent. 33.

(242) *Wilson v. Wilks*, 2 Ld. Ray. 1131.

(243) *London v. Vanacre*, 12 Mod. 270. S. C. 5 Mod. 439. S. C. 1 Ld. Ray. 498. *Fazakerley v. Wiltshire*, 1 Str. 462.

(244) *Pierce v. Bartrum*, Cowp. 270.

and perhaps in this respect, a Corporation by charter has little more power than a company created by the same instrument. But with regard to their conduct as people of the place, put under the superintendence of the Corporation, all those who inhabit or frequent a municipality, are liable to its by-laws. What must be confined to freemen, and what may be extended to the people of the place in general, will appear from the subsequent pages. How far residents and people frequenting a place may be affected by customs of a Corporation, has been already in some measure shown.

Residents.

245. All persons who become members of a Corporation, by that act manifest their consent to submit themselves to all reasonable by-laws in force at the time of their admission, and to all such as shall be afterwards enacted by a majority of the body. This observation relates also to those who become members of a company or guild.

Assent by becoming freemen.

246. All persons who come to reside or trade within a municipality, by doing so subject themselves to all such reasonable by-laws of the Corporation relating to the trade and good government of the place, as are then in force, and to such as shall be enacted while they continue to reside.

By becoming residents.

247. Whoever submits himself to by-laws by becoming a member of the Corporation or company, or by coming into the municipality, must take notice of them at his peril.

Implied notice.

(245) *Adley v. Reeves*, 2 M. S. 60.

(246) *Chamberlain of London*, 5 Co. 63. *Cudden v. Estwick*, 6 Mod. 124. *Pierce v. Bartrum*, Cowp. 270.

(247) *Cudden v. Estwick*, 6 Mod. 124. *Prigge v. Adams*, Skin. 350. *Pierce v. Bartrum*, Cowp. 270.

By-laws of
Company,
when bind-
ing.

248. A company can only make by-laws binding upon its members ; and if incorporated in a particular place, as the Horners' company of London, it cannot make by-laws binding, even upon its members, beyond the limits of that place.

On whom.

249. A company of a particular trade within a municipality, having no local jurisdiction, cannot make by-laws binding upon any persons of that trade within the municipality, except their own freemen ; but where the charter incorporates all of a certain trade within a prescribed district with power to make by-laws in regulation of that trade, a reasonable by-law consonant with that power is obligatory on all those who exercise such trade, although they have not become freemen of the company.

In what re-
spects.

250. A Corporation cannot bind any, except its members, without custom or express provision by statute ; for this reason, the university of Oxford cannot (unless perhaps by a particular prescription) make a by-law prohibiting the townsmen being abroad in the streets after nine o'clock at night. In a subsequent case it was observed that this case of Oxford was not decided on the ground of jurisdiction, but on that of public expediency. For though the jurisdiction were sufficient to support the by-law as restrained to the members of the university in preventing them from being abroad at night, it were most inconvenient to so limit the townsmen of a large place, on account of their trades and occupations.

(248) *Horner's Comp. v. Barlow*, 3 Mod. 159. *Pierce v. Bartrum*, Cowp. 270.

(249) *Franklin v. Green*, 1 Bulstr. 12. *Pierce v. Bartrum*, Cowp. 270. *Butchers v. Morey*, 1 H. B. 370.

(250) *Dodwell v. Oxford*, 2 Vent. 33. *Butchers v. Morey*, 1 H. B. 375.

251. The by-laws made by a municipal Corporation, for the government of a franchise or liberty granted to them with local jurisdiction, beyond the limits of the municipality, are as binding on persons going into the liberty, as the by-laws of the city upon those who come within its walls. In a foreign franchise.

252. Dissenters protected by the Toleration Act, although freemen, are not subject to the by-laws which punish refusal of corporate offices, previous to the undertaking of which, the sacrament is required to be received by stat. 13 Car. 2., if they are disqualified by reason of conscientiously omitting to receive the sacrament according to the forms of the Church of England. Exception of Dissenters as to offices.

III. WHAT BY-LAWS ARE VALID OR VOID.

This subdivision is again divided into the following heads:—

- I. By-laws concerning the delegation of corporate powers.
- II. By-laws concerning offices.
- III. By-laws concerning admission.
- IV. By-laws concerning freemen in particular.
- V. By-laws concerning the government of the place.

The first of these minor divisions comprehends the consideration of the power which the Corporation at large, being invested with the right to make by-laws, possesses of delegating that, as well as the rights of election and amotion, to a select body constituted by themselves. By-laws concerning powers.

(251) *Fazakerley v. Wiltshire*, 1 Str. 462. *London v. Vanacre*, 1 Ld. Ray. 498.

(252) *Guilford v. Clarke*, 2 Vent. 247. *Harrison v. Evans*, 6 Bro. P. C. 196. S. C. cited Cowp. 393. n. 535.

Common
Council to
make by-
laws, in-
stead of
Corpora-
tion.

253. It has been said, that the Corporation at large may by a by-law constitute a common council, consisting of each of the definite classes, and certain persons periodically selected from the commonalty, and delegate to that body the power of making by-laws; that such a body, being the representatives of the whole Corporation, may possess a greater power of making by-laws than the king's charter can confer on a common council of its creation; indeed, that it may divest the Corporation at large of their right of electing both officers and members, and transfer it to a select body. It was also said, that of this nature are the select bodies, called the common council in prescriptive Corporations. But as the whole fabric is built upon the basis of legal presumption, I cannot imagine how a body thus constituted can possess greater powers than a body similarly constituted by the king's charter, to the terms of which, the law presumes that the whole Corporation have equally yielded their assent. Where such a common council is annually elected by the votes of the commonalty, there is some semblance of representation. But under what form of constitution are representatives empowered to transfer the greatest privileges of their constituents into other hands, or still more presumptuously to arrogate them to themselves?

To elect.

254. The Corporation at large, may make a by-law, creating a select body, to whom they may delegate the power of electing officers and members of the Corporation. To the validity of which, the following circumstances are essential.

By whom
made.

255. The by-law must be made by a corporate assembly, consisting of a legal majority of each definite class,

(253) *R. v. Maidstone*, 3 Bur. 1837. 4 Bur. 2208.

(255) *R. v. Tomlyn*, C. and T. H. 316. *R. v. Maidstone*, 3 Bur. 1837. 4 Bur. 2209. *R. v. Head*, 4 Bur. 2521. *Hoblyn v. Regem*, 6 Bro. P. C.

and a sufficient number of the indefinite class. This is necessary on general principle; but as all such by-laws as have been recognized, have been admitted either upon presumption from ancient usage, although within time of memory, or upon a contest whether there were a body capable of making them, no question has ever been before the Court, as to the sufficiency of the assembly by whom they were actually made.

Unless both the power of making by-laws, and the right of electing such officers or members, were in the Corporation at large, such a by-law cannot be presumed. It has been already shown, that when it has not been transferred by charter or usage, the general power of making by-laws is in the body at large. It has also been shown, that it is not divested by a grant to a select body of the power of making by-laws in particular cases, or even by a grant to a select body of the general power of so doing. So that there always remains in the body at large, a power of making by-laws to dispossess themselves of the elective franchise if it have been reposed in them. Thus all the cases on the subject, decided by Lord Mansfield, and of which one was affirmed in the House of Lords, are in most cases reduced to a matter of pleading. For if it be averred that the by-law supposed to be lost, was made by the Corporation at large, and usage be adduced conformable to it, the contrary cannot be proved by showing that the general power of making by-laws, is confined to a select body; which was formerly held sufficient to refute the averment.

When it
may be pre-
sumed.

519. *Newling v. Francis*, 3 T. R. 189. *R. v. Holland*, 2 East, 70. *R. v. Ashwell*, 12 East, 28. *R. v. Bird*, 13 East, 385. *R. v. Westwood*, 4 B. C. 800. 2.

Not made
by select
classes.

If however, the by-law is averred to have been made by a select body, in whom the power has been reposed, whether by prescription or charter, it must be held void, unless there be an express power for this purpose; although that body be called a common council, and consist of a certain number of common councilmen besides the mayor, aldermen, burgesses, &c.; for this sort of common council created by charter, does not represent the body at large. The common councilmen are as much a select class as the aldermen.

Of whom
this Com-
mon Coun-
cil must
consist.

256. The select body to whom this power is transferred must consist of each of the definite classes, and some of those who are members of the indefinite class. A doctrine restrictive of this rule also has lately been carried to the extreme. It was formerly held, that the definite classes, appointed by the crown, could not alone be invested with this power; and that to the mayor, aldermen, burgesses, &c. being definite and select classes, some must be added from the commonalty, who ought to be distinguished from their companions by a peculiar corporate character, such as having served temporary corporate offices, as that of clothing burgesses, or the livery, or by some other corporate distinction; but that having served offices foreign to the corporate character, such as those of churchwarden or overseer of the poor, or even of recorder, if not a corporator but a mere legal adviser appointed by the mayor, was no proper criterion for forming a select body, to be invested with the incidental rights of the Corporation. The principle is plain both in the case of Corporations, and the whole series of cases from that time to the decision in 4 Barnewall and Cresswell, that some persons must be added by the commonalty to those who were nominated by the crown, or appointed to hold a particular

office; and the only ground upon which it was originally advanced is, that to avoid popular confusion, the exercise of the franchise (for the right still remains in the body at large, and may at any time be resumed by repealing the suppositious by-law) was entrusted to certain of the commonalty appointed to represent the rest, in the manner of the lower house of parliament, who were to join in deliberation with the definite classes, a sort of aristocracy, and to control their corporate actions. But in a recent case, it has been held that the aldermen, though a definite class elected for life, are not in all cases an integral and distinct body from the commonalty; relying upon the circumstance that they were not mentioned distinctly in the clause of the charter, granting the right of election to the "mayor, bailiffs, and burgesses." Yet the doctrine that no integral part of the Corporation can be excluded from a voice in the election, is not expressly overruled; and it may still be laid down as law, that if the supposed by-law exclude from participating in the election the whole of the commonalty, affecting to transfer the right to the definite integral parts only, it is void.

Abbot, C. J.
dubitante.
Bayley, J.
contra.

257. It was formerly considered that the only power of election which could be transferred, was that of the municipal officers, and not the election of members into the Corporation. But it has been determined in a recent case, that the power of electing burgesses mere freemen, may be transferred, as well as that of electing the officers of the body politic.

The election of whom.

Bayley, J.
contra.

It is not my intention generally, to introduce abridgments of the cases, but to refer only to the different points as they come under their proper titles; but the last upon this subject has so greatly extended

the rule laid down in the celebrated case of Corporations, upon which all the subsequent determinations have proceeded, and as they contain nothing irrelevant to the preceding questions, an abridgment of them is here offered.

Case of
Corpora-
tions.

258. In this term at Serjeant's Inn in Fleet Street—It was demanded of the Chief Justices Popham and Anderson, Periam Chief Baron, and the other Justices, that when divers cities, boroughs, and towns are incorporated by charters, some by the name of mayor and commonalty, or mayor and burgesses, &c. or bailiffs and burgesses &c. or aldermen and burgesses, &c. or provost or reve and burgesses or the like; and in the said charters it is prescribed that the "mayors, bailiffs, aldermen, provosts, &c." shall be chosen by the commonalty, or burgesses, &c.; if the ancient and usual elections of mayors, bailiffs, provosts, &c. by certain selected number of the principal of the commonalty or burgesses, commonly called the common council, or by such like name, and not in general by the whole commonalty or burgesses, nor by so many of them as would come to the election, were good in law: for as much as by the words of charters, the election should be indefinitely by the commonalty, or by the burgesses, which is as much as to say by all the commonalty, or all the burgesses &c.—Which question, being of great importance and consequence, was referred by "the Lords of the Council," to the justices, to know the law in this case, "because divers attempts were of late, in divers Corporations" contrary to the ancient usage to make popular elections: and it was resolved by the justices upon great deliberation and conference had amongst themselves, that such ancient and usual elections were good and well warranted by their charters,

and by the law also; for in every of their charters they have power given them to make “laws, ordinances, and constitutions for the better government and order of their cities or boroughs, &c. by force of which” and for avoiding of popular confusion, they by their common assent constitute and ordain, that the “mayor or bailiffs or other principal officers” shall be elected by a “selected number of the principal of the commonalty, or of the burgesses as is aforesaid,” and prescribe also how such selected number shall be chosen; and such ordinance and constitution was resolved to be good and allowable, and agreeable with the law and their charters for avoiding of popular disorder and confusion: and although now such constitution or ordinance cannot be showed, yet it shall be presumed and intended, in respect of such special matter of ancient and continual election (which special election could not begin without common assent), that at first, such ordinance or constitution was made; such reverend respect the law attributes to ancient and continual allowance and usage, although it began within time of memory.

The principal points of the case are:—

1. That the by-law may be made, when the commonalty have the power to make by-laws, ordinances, and constitutions, for the better government and order of their cities, &c.
2. That such by-law shall be presumed from ancient and continual usage of such special election; for it could not begin without common consent.
3. That the mayor or bailiffs, or other principal officers shall be elected,—

4. By a select number of the principal of the commonalty, or the burgesses commonly called the common council, or by such like name, and not in general by the whole commonalty, &c.

1. By-law,
by whom
made.

128. If by their charter the mayor and aldermen are to be elected by them (the commonalty), all this is not to be altered but by and with the general assent of the whole town, by this means to take away confusion.

129. The power of making by-laws, was in the mayor jurats and common council (that is, the mayor, twelve other jurats, and forty common councilmen); the by-law was averred to have been made by the mayor, jurats, and common council (who were officers for life). Held, that this by-law made by them was void, because they are a select class, and the assent of the commonalty cannot be presumed.

130. The power of making by-laws was in the mayor and aldermen; the by-law was averred to have been made by the mayor and aldermen, with the assent of the commonalty.—Held that the power of making by-laws vested in the mayor and aldermen, excludes the commonalty; so that this by-law made by the mayor, aldermen, and commonalty is void.

131. In this case the by-law was by the Corporation at large, who had from time immemorial made by-laws for ordering the manner of election, and therefore valid.

(260) Colchester Case, 3 Bulstr. 71.

(261) R. v. Spencer, 3 Bur. 1837. R. v. Cutbush, 4 Bur. 2208.

(262) R. v. Head, 4 Bur. 2521. Hoblyn v. Regem, 6 Bro. P. C. 519.

(263) Newling v. Francis, 3 T. R. 189.

264. The by-law was made by the whole Corporation, and it would appear that the charter said nothing as to who might make by-laws: this was held to be valid.

265. It was held that within seventy years after the grant of the charter, there could be no sufficient usage to raise the presumption of a lost by-law, vesting the right of election in a representative body. ^{2. Presumed.}

Several of the subsequent cases were upon by-laws extant and pleaded.

266. It is not sufficient that there be a very long usage to this purpose, when the Corporation is by charter, (it may be otherwise when it is by prescription;) for no length of usage will establish a form of election, contrary to the charter, unless the jury expressly find that there was such a by-law.

267. This case speaks only of mayor and aldermen. ^{3. Who to be elected.}

268. The election was that of a common councilman, to which counsel contended that the rule did not apply; but the Court made no remark on this point, the by-law being declared void on other grounds.

269. The election was of a burgess or common free-

(264) R. v. Ashwell, 12 East, 22.

(265) R. v. Grosvenor, 7 Mod. 198.

(266) R. v. Tomlyn, C. T. H. 316. R. v. Castle, Andr. 124. R. v. Tucker, 1 Barnard. 27.

(267) Colchester, 3 Bulstr. 71.

(268) R. v. Spencer, 3 Bur. 1830. R. v. Cutbush, 4 Bur. 2207.

(269) R. v. Head, 4 Bur. 2515.

man; but the by-law was held void on another point, and this not noticed.

270. The question was of the election of a mayor: the by-law extended only to the choice of mayor, bailiffs, and councillors of the borough.

271. The office was that of an alderman.

272. The election was of burgesses common free-men; but there was an inchoate right to freedom in certain classes of persons. — Lord Ellenborough: “I see no reason why the rule is not as applicable to the election of burgesses at large, as of the higher orders of the Corporation.”

4. By whom
the election
is to be
made.

273. The corporate name was “mayor, jurats and commonalty” — the Corporation was to consist of “mayor thirteen jurats (including the mayor), and forty common council men” (officers for life) — the right of election was in the mayor, jurats, and commonalty — this was transferred to the mayor, jurats, common council, and such of the common freemen as had executed parochial offices in the municipality. The by-law confining the election to freemen distinguished by such offices is void, because they are not connected with the Corporation.

“The charter having named the common council, shows that they were meant to be a distinct body or

(270) *Newling v. Francis*, 3 T. R. 189.

(271) *R. v. Ashwell*, 12 East, 22.

(272) *R. v. Bird*, 13 East, 384.

(273) *R. v. Spencer*, 3 Bur. 1837. 1840.

class. No by-law could have confined it to the common council alone." Per Wilmot J.

"The common council named in this charter are plainly a distinct body from the commonalty. Per Yates J.

"The common council, though part of the corporate body, are a distinct class from the commonalty; they are part of the select body to whom the power of making by-laws is given. A by-law may narrow the number of the same electors, but it cannot transfer the right of election to different persons." Aston, J.

274. This was the same Corporation as in the last cases. The by-law directed the election to be by the mayor, jurats, common council, and the "sixty freemen first in seniority of freedom." By Lord Mansfield and Mr. Justice Yates: This by-law is bad for altering the constitution of the Corporation. But note, it was a by-law recently made and in existence, affecting to alter a recent charter on the granting of which there was a great contest whether the right of election should be in a select class, or the commonalty, and they declared it bad on another ground, that is, because it was made by a select body.

275. The corporate name was mayor and commonalty, consisting of a mayor, four aldermen, and an indefinite number of burgesses: the right of election in the mayor and commonalty, and transferred to the mayor and aldermen alone. In the King's Bench the case was

(274) *R. v. Cutbush*, 4 Bur. 2208.

(275) *R. v. Head*, 4 Bur. 2521. *Hoblyn v. Regem*, 6 Bro. P. C. 519.

determined on another point. In the House of Lords it was declared that the power could not be restrained to the mayor and aldermen alone.

276. The election had never been regulated by prescription or charter, but by various by-laws; and the last directed it to be by certain of the commonalty appointed by the commonalty according to an arrangement of their own.

277. In these cases Kenyon, C.J. intimated his opinion against by-laws limiting the number of electors appointed by the charter; although made by the whole Corporation.

278. In this case the corporate name was mayor and burgesses, to consist of a mayor, two sheriffs, seven aldermen (including the mayor), and an indefinite number of burgesses: the right of election was in the mayor and burgesses: it was devolved upon the mayor, recorder, aldermen, coroners, common-council-men, and those who had served or then served the office of chamberlain or sheriff, called the clothing burgesses. This by-law was held good, for the right is delegated by the commonalty to a "select part of themselves, consisting of such of the burgesses as had served or were serving certain offices, and were called the livery or clothing burgesses;" and the qualification is proper; for the offices of chamberlain and clothing burgesses appear to be corporate offices.

(276) *Newling v. Francis*, 3 T. R. 189.

(277) *R. v. Ginever*, 6 T. R. 735. *R. v. Holland*, 2 East, 74.

(278) *R. v. Ashwell*, 12 East, 28.

279. The name was mayor and burgesses ; the Corporation consisted of a mayor, seven aldermen (including the mayor), and an indefinite number of burgesses : the right of election was not affected by the charter, and therefore remained in the mayor and burgesses ; it was transferred to the mayor and aldermen and eighteen of the burgesses chosen by the mayor and burgesses out of such burgesses as had served the office of sheriff or chamberlain of the town, called the livery or clothing burgesses, to be of the common council together with the recorder (if he should be a burgess and attend) and six burgesses chosen by the mayor and burgesses from amongst the burgesses (if they or any of them attend). It was observed by Lord Ellenborough, that the Corporation consisting of the mayor and burgesses, the aldermen are selected only as part of the burgesses. It was held, that the additional eighteen and six burgesses constitutes a body selected out of the commonalty, in addition to the orders constituted by the charter, and that the by-law is good ; but it must be shown that the recorder is one of the corporation, because the by-law is void if it attempt to introduce any person who had not a previous right of voting.

Having collected the decisions prior to that of the King against Westwood, the following is an analysis of that case arranged under the same points.

280. The by-law was averred to have been made by the mayor, bailiffs, and burgesses, being the Corporation at large ; and the question was whether the incidental power were taken away by this clause.—The King

1. By-laws,
by whom
made.

(279) R. v. Bird, 13 East, 384.

(280) R. v. Westwood, 4 B. C. 782. 798. 818. S. C. 7 D. R. 269. 286. 297.

granted to the mayor, bailiffs, and burgesses, that the aldermen and bailiffs should be called the common council, and that the mayor aldermen and bailiffs should have full power and authority, to make reasonable laws and ordinances whatsoever as to them should seem necessary for the government of the burgesses inhabitants of the borough, and for declaring in what manner and order the mayor, aldermen, bailiffs, and burgesses should behave in their offices and business, and otherwise for the good and public advantage of the borough, and for the management of their lands and other matters and causes whatsoever, touching or in anywise concerning the borough or the state, right, and interest of the same.—It was held that the incidental power of making by-laws in cases unprovided for by this clause remained in the body at large, at least that the body at large, being possessed of the elective franchise, had an incidental power of regulating the manner in which it should be exercised. By *Littledale and Holroyd Js.*, — *Abbot C. J.* doubting. For this clause appears to repose in the select body, the power of making by-laws in all cases where it is necessary that they should be provided, and no other power is incidental to a Corporation.

2. Presumed.

281. The by-law in this case was not extant, but averred to have been made and lost with an averment of subsequent usage to the effect of it.

3. Who to be elected.

282. The by-law was for the election of burgesses mere freemen. Held that the election of such burgesses is as much within the rule as the election of the prin-

(281) *R. v. Westwood*, 4 B. C. 786. S. C. 7 D. R. 273.

(282) *Id.* 806, 829, 833. S. C. 7 D. R. 292, 312, 315.

cipal officers—per Holroyd and Littledale Js.,—Bayley J. *contra*. Because in the case of principal offices, the select body has only the power of appointing who shall fill an office which must be supplied, whereas in this case it not appearing that there is an inchoate right to freedom in any classes of persons, the select body may by such a by-law possess themselves of the power of limiting the number of which the Corporation shall consist; which is contrary to the constitution erected by the charter, and involves an illegality in as much as, by restricting the number of freemen below the select class, it may prevent the possibility of the by-law being repealed, and thus usurp that power in opposition to the will of every freeman who comes into the Corporation.

283. The corporate name was mayor, bailiffs, and burgesses: the Corporation consisted of a mayor, two bailiffs, twelve aldermen and an indefinite number of common burgesses—the right of election of burgesses was by the charter reposed in the mayor, bailiffs, and burgesses: *—this was transferred to the mayor and common council alone, which the charter declared that the mayor, bailiffs, and burgesses should be, and be called. Held that the aldermen and bailiffs, as to the business particularly entrusted to them, are distinct integral parts of the Corporation—as to the right of election, they are not integral parts distinct from

4. By whom election is to be made.

(283) R. v. Westwood, 801. 820. S. C. 7 D. R. 291. 304. 305.

* The right to elect the mayor was by the charter reposed in the mayor, aldermen, bailiffs, and burgesses, from among the aldermen; and that of electing the bailiffs, in the mayor, aldermen, and bailiffs, out of the burgesses—the election of aldermen in the mayor and such of the residue of the aldermen as should be assembled, out of the burgesses.

the commonalty, but a part of the burgesses at large* ; —that had the right of election been conferred on the “mayor, aldermen, bailiffs and burgesses,” it had been otherwise, for this had implied that they must act as distinct integral parts† ;—and that the by-law is good, for the burgesses at large are represented by the aldermen‡, “although it is as little representation of them as one can well imagine.”

It is with the utmost humility, I venture to offer suggestions to the most learned men of the profession ; but I am so deeply impressed with the importance attached to this series of decisions, that I trust I shall not be thought to overstep the bounds of propriety, in commenting upon them. Considered in an abstract point of view, perhaps it were much more convenient, that the direction of the affairs of a municipal Corporation should be in the hands of the select classes ; than subject to the indiscretion or caprice of the multitude. Indeed, an investigation of the powers of municipal Corporations, merely in their corporate capacity, induces a conclusion, that it is not very impor-

* The effect of this doctrine would be, that supposing no by-law had been made, and the Corporation had proceeded to an election on notice, or on the charter day, if the mayor and one other burgess were present, though neither bailiff nor alderman, they would constitute a sufficient electoral assembly ; for if these are held to be in their elective capacities mere burgesses, they are, as such, members of an indefinite class, of whom ever so small a number is sufficient.

† It may be remarked, that the clause giving the power to the mayor, bailiffs, and burgesses, bestows it on the body politic, in their corporate name.

‡ Officers for life, in whose election the burgesses at large have no voice or influence.

tant in whose hands these disputed privileges are vested. And in this want of importance, history informs us that those usurpations, by legal presumption attributed to by-laws, in reality had their origin. While the affairs of the Corporation alone were to be managed, and the right of returning members to parliament, was regarded rather as an inconvenience than a privilege, the supineness of the commonalty in general permitted the administration of corporate affairs, and among others, the right of election of their officers, to devolve upon the select classes. From the Case of Corporations this usurpation received its first legal sanction; the franchise of parliamentary election had, at that time, begun to be considered of some importance, and though pecuniary influence had not been much resorted to, the eyes of government were turned attentively to the condition of corporate boroughs. The Case of Corporations was not one of ordinary occurrence; it was not a contest for a seat at the bench of aldermen, or a dispute among the burghers of some paltry town; but a case prepared in the privy council, and transmitted by the Queen's ministers, to the judges to receive that opinion which we know the crown was in those times wont to desire, when it had in view some affair of prerogative. That case is the basis of this superstructure, which is too ancient, it may be said, to be now subverted. At that time there was an influence possessed over the bench by the crown, from which our tribunals are now emancipated. The judges held their seats at pleasure; and though they were manly enough to maintain that the right of voting in elections of representatives in parliament could not be surrendered by the freemen of Corporations devolving it upon the select classes, by means of a by-law; yet by conceding the point as to

the election of corporate officers, they increased the influence of the select classes, who were more under the direction of the crown than a larger body. But the influence which such classes derived from that case cannot be compared to that which they may obtain under the sanction of the last. A court of justice does not take judicial notice of the sinister motives of the parties, who come before them, and the precedent having been long established, it became wholly a question of analogy, and of the construction of words in a charter. Did those cases in truth affect only the corporate arrangements, they would be rarely heard of in Westminster Hall; rarely has a quo warranto been prosecuted against an officer of a Corporation, who had no interference with the return of members to parliament; rarely has an alderman of such a body adopted the expensive proceedings of mandamus, to obtain restoration to his precedence of place. It is in the breasts of the judges to determine the propriety of restraining or extending the rule established by a great number of precedents, and not to submit to the arbitrary opinions of their predecessors. Upon this ground, although the former cases have not gone to the exact extent of the case of Westwood, it was as open to the judges of our day, to extend the rule if they considered it expedient, as it was to their predecessors, to lay it down under certain restrictions. The effect of this determination, as one of the learned judges observed, is to throw the corporate franchise into a few hands; and although in some places the inchoate rights of heritage and apprenticeship may in some measure counteract that effect, yet in others, it may be used to unconstitutional purposes. And even in boroughs where the number of freemen is great, it is in the power of a select body

to serve a present purpose in making a return to parliament, by introducing at any time sufficiently long before an anticipated election, a sufficient number of their own party, to secure a certain majority. Or by this means, the number of electors of members of parliament may be indirectly limited, which cannot be done by the express provisions of a by-law.

284. The power of making such by-laws is not confined to municipal corporations, but a prescriptive company, having a livery and power to make by-laws, may appoint that a select body of the company shall elect liverymen out of their yeomandry.

Such by-law by Company.

285. The same body which makes the by-law, has at all times a right to repeal it; but as they are an indefinite class, this can only be done, it would seem, on the charter day, or some day set apart for business of that nature; when a general notice ought to be given, or on a by-day after a particular notice to all the freemen. But as this ought to proceed from the mayor, there may be great difficulty in effecting the repeal without the assistance of the Court.

These by-laws may be repealed.

286. A by-law that the mayor shall admit to the freedom any person who will pay a certain sum of money is void, for this is a sale of the franchise.

By-law to admit for money.

287. When custom or charter has not given the head officer a casting vote, a by-law giving him a second vote in case of equality is void, for it is against the form of the constitution.

Giving a casting vote.

(284) *Vintners v. Passey*, 1 Kenyon's Cases, 500.

(285) *R. v. Ashwell*, 12 East, 29. *R. v. Westwood*, 4 B. C. 832. 840.

(286) *R. v. Bird*, 13 East, 384. *R. v. Breton*, 4 Bur. 2267.

(287) *R. v. Ginever*, 6 T. R. 736.

Vote to a
stranger.

288. On the same ground, a by-law is void, which pretends to give the right of voting to any person who does not possess it under the custom or charter; as if it be given to the recorder, when not a corporate officer, but merely a legal adviser.

Right of no-
mination.

289. If the right of electing the mayor from among the burgesses be reposed in the Corporation at large, they may make a by-law that the common council, a select class constituted by charter, shall nominate two or three burgesses, of whom the body at large shall elect one to be mayor. This position is, I presume, subject to the rules on the construction of the case of Corporations.

290. If the charter direct that the mayor shall be elected by the twenty-four capital burgesses from amongst themselves; a by-law may ordain that the common burgesses shall nominate five of the capital burgesses, of whom the capital burgesses shall elect one. This case was determined on another point, and the observation does not appear to be law; for it gives the common burgesses a right to vote, which they had not originally. I cannot help thinking that there is a mistake in the report, and that the mayor was eligible out of the capital burgesses, not by the capital, but by the burgesses at large.

Voting for
members of
parliament.

291. A by-law cannot divest the commonalty of the franchise of voting in the election of members of par-

(288) R. v. Bird, 13 East, 384.

(289) R. v. Hoare, 1 Barnard. 414. undecided. R. v. Castle, Andr. 124. very confusedly stated. Butler v. Palmer, 1 Salk. 191.

(290) Barber v. Bolton, 1 Str. 315.

(291) 4 Inst. 48.

liament, and vest it in a select class of their constituting; for they exercise this franchise, not for their own exclusive benefit, but for the advantage of the nation. There may be another reason assigned, which is, that this franchise is not vested in them as members of the Corporation, but as citizens of a city, or burgesses of a borough, and the corporate character, is only a distinction by which the proper persons may be ascertained.

292. And where the form of election has been appointed by statute, it cannot be altered by any by-law. Corporation by statute.

It has not been determined whether the power of removing from office, or of disfranchising freemen, can be delegated by a by-law to a select class, V. Amotion.

(2.) *Concerning Offices.*

293. In a Corporation there are incidental and reciprocal rights between the individual members and the body: on the part of the members, every freeman has an equal right to be elected to offices and distinctions; and on the part of the body, it has a right to the service of every member in that office, to which the majority shall think proper to elect him. These rights may be equally restrained by the peculiar constitution or charter of each Corporation; and they may be in some respects regulated, but cannot be taken away by a by-law. The nature of those rights will be partially considered in another place; in this it is necessary only to show how they may be affected and enforced by ordinances made among themselves.

(292) *R. v. Barber Surgeons*, 1 Ld. Ray. 585. *R. v. Miller*, 6 T. R. 277. *R. v. Haythorne*, 5 B. C. 425.

Right to be
elected.

294. A by-law cannot limit the classes, or narrow the number of persons eligible to offices according to the constitution. Therefore where the warden is eligible out of the commonalty, a by-law declaring that he shall be elected out of a select class is void, although that class be part of the commonalty. In this case, the select class was called assistants, created by an anterior by-law and to be thus constituted—The warden, an annual officer, was empowered to nominate a definite number of such of the commonalty as had served the office of bailiff or tythingmen, to be assistants for life.

295. Neither can a by-law extend the right of eligibility to classes of the Corporation excluded by the constitution. If therefore, the charter direct that the mayor shall be elected out of the burgesses at large, exclusive of the aldermen, a by-law either restraining the right of eligibility to the aldermen, exclusive of the burgesses, or directing that the election shall be out of the aldermen, as well as the other burgesses is void. In this case, the by-law appointed, that a certain number should be nominated, of whom some should be aldermen, and some might be other burgesses, and that one of the nominees should be elected; and it was held void.

Right to
service of
freemen.

296. A corporation having a right to the service of all its members, may make a by-law to enforce it. But this cannot be extended to punish for non-acceptance of office, those who are ineligible to such office. Who are eligible, will be considered under title Election.

(294) *R. v. Spencer*, 3 Bur. 1833. B. N. P. 207. *Lee v. Wallis*, 1 Kenyon Ca. 292. *S. C. Sayer*, 263. *R. v. Tappenden*, 3 East, 191. V. tit. 297.

(295) *R. v. Weymouth*, 7 Mod. 374. S. C. 4 Bro. P. C. 464.

297. A by-law cannot create a new office such as that of deputy recorder: if it be necessary to have one, a new charter must be obtained. New office.

298. A by-law may impose a penalty upon any one refusing the office of mayor, sheriff, alderman, common councilman, chamberlain, liveryman of a company member of the corporation, or indeed, any other office, to which he is eligible for the benefit of the corporation. If this by-law merely impose a penalty for the refusal, the person elected may notwithstanding payment of the fine, be compelled to undertake the office; for it is not in the nature of an equivalent for his service, and his refusal has the effect of throwing an incumbrance upon another, in being elected before his turn. But if the by-law treat the penalty as a compensation, by putting it in the alternative that he shall serve the office or pay the fine, of course he is exempted on payment. Penalty on refusing office.

299. This penalty may be imposed for refusing offices of a public and magisterial nature, although the recusant is liable to be punished by indictment or information; and where there is such a by-law, if there be a doubt of his liability to serve, an information will be refused, until the effect of enforcing the by-law has been tried in vain; so will it, when from the peculiar situation of the person elected, his non-acceptance of the office appears to have little of a criminal nature.

(297) *R. v. Ginever*, 6 T. R. 735.

(298) *Vintners v. Passey*, 1 Bur. 239. *S. C. Kenyon* Ca. 500. *R. v. Bower*, 1 B. C. 587. *S. C. 2 D. R.* 243.

(299) *London v. Vanacre*, 1 Ld. Ray. 499. *R. v. Grosvenor*, 1 Wils. 19.

300. So, a company may impose a fine on its members, for refusing to accept the constitutional offices to which they are eligible; nor is the by-law less valid because it also requires that the person accepting the office shall pay a fee on admission, for the benefit of the company; and the Court will not scrutinize its reasonableness, because all the freemen have assented to the regulation which raises a presumption that under their peculiar circumstances it is reasonable, or at least, that they deem it so. On this ground a by-law of a company was held good, which declared that a yeoman of the company, elected to the livery, should upon notice, attend to be admitted and pay thirty guineas towards the company's funds, and that if he refused or neglected he should forfeit 25*l*.

301. The by-law usually contains a provision that he shall be liable on refusal "without reasonable excuse." This is unnecessary, for in an action to recover the penalty, the defendant may show any reasonable legal excuse, although there is no such restriction. It was once doubted, whether the by-law was good, which punished a refusal "without reasonable excuse, to be allowed by the court of assistants" to whom the penalty was payable: but as this is rather an indulgence, in as much as they may be content with an excuse insufficient in law, and as their refusal to admit it does not preclude its being pleaded to an action for the penalty, there appears to be no good reason for the doubt, and in another case, it was considered no sufficient objection to the by-law, that the reasonableness of the ex-

(300) *Barber Surgeons v. Pelson*, 2 Lev. 252. *Vintners v. Passey*, 1 Kenyon Ca. 500. S. C. 1 Bur. 339.

(301) *Stationers v. Salisbury*, Comb. 222. *London v. Vanacre*, 1 Ld. Ray. 500. S. C. 5 Mod. 442. S. C. 12 Mod. 273.

cuse for refusing the office of sheriff, was to be allowed by the court of mayor and alderman of the Corporation, to whose use part of the penalty was recoverable.

302. A by-law may be made for compelling acceptance of an office in a franchise beyond the municipality, conferred on and accepted by the Corporation: for by such acceptance the whole Corporation, undertake to provide such officer, and he must of course be eligible from among the body at large, who receive the benefit, unless, by the terms of the grant, he is to be elected out of any particular class. And the general rule of making by-laws for the regulation of a similar office in the municipality, is applicable. Of this nature is the office of sheriff of Middlesex.

303. The by-law may proceed still further. When the officer must be ready on the day, or the franchise becomes liable to forfeiture, or the administration of justice would be impeded, it may require, under a penalty that the person elected shall appear at the municipal court, held a reasonable time before the office is to be entered upon, and there consent to undertake it at the proper time, and make a bond in a considerable penalty, to be forfeited on neglect in performing his engagement. Of such a nature is the office of sheriffs of London and Middlesex, because if one refuse the Corporation ought to have an opportunity of electing another in due time.

(302) *R. v. Vanacre*, 1 *Ld. Ray.* 499. *S. C.* 12 *Mod.* 272. *S. C.* 5 *Mod.* 440.

(303) *Id.* 1 *Ld. Ray.* 499. *S. C.* 5 *Mod.* 439, 440. *S. C.* 12 *Mod.* 272. 440.

304. The penalty may be imposed for refusing an office which requires a substantial man, on account of its dignity and expence, such as the sheriff of London, "unless the person elected shall swear that he is not worth 10,000*l.* and bring six compurgators, approved by the court of the Corporation, to swear that they believe the truth of his assertion." For this is not imposing an oath, but allowing a favour to the person liable, by permitting him to exonerate himself by a form more indulgent than that prescribed by the common law, where one who would relieve himself from the claim of a debt, is not only required to swear that it is not owing, but to produce twelve compurgators, to affirm on oath their confidence in his veracity.

305. A by-law cannot enforce the undertaking of an office by imprisonment of the person elected, except there be a special custom to that effect. But it was said by Kelyng that the court of mayor and aldermen of London, may imprison a freeman elected to the office of alderman, for refusal before them, without sufficient excuse, for they may want aldermen. But this power is assigned to them as a court of record, which may thus punish a contempt. It may be contended, that the power of imprisoning for disobedience to a court of record, must on every principle of justice, be confined to cases where the court has a right to command, or where the disobedience is accompanied with other impropriety of conduct, and in this case, perhaps, the court ought not to command such acceptance, but leave the recusant to be punished by information, indictment, or action on a by-law, said to be

(304.) *London v. Vanacre*, 1 *Ld. Ray.* 497. *S. C.* 5 *Mod.* 442. *S. C.* 12 *Mod.* 272. *S. C.* 1 *Salk.* 142. *S. C.* *Carth.* 482.

(305) *Grafton*, 1 *Mod.* 10. *R. v. Grosvenor*, 1 *Wils.* 18.

the only methods of compelling the acceptance of office. But it may be replied, that this dictum of Kelyng's can be sustained by analogy to the power of the Court of King's Bench ; for if that Court issue a writ of mandamus to one elected, requiring him to undertake the office, or to show his excuse, and he make no return, or one that is insufficient, and be again commanded by a peremptory writ and disobey, he is liable to an attachment.

306. A company of London cannot imprison a member for refusing the livery, although it may impose a penalty.

307. It is not necessary that the by-law require notice to the corporator of his election, for he is presumed to be always present at, or acquainted with the proceedings of the Corporation courts according to his duty.

308. And a by-law may punish in its members a discontinuance in rendering their service, as well as their first refusal. Therefore it is a good by-law, which imposes a penalty on a common-council-man if he resign or lay down his office.—There may be some doubt, as to resignation: the punishment ought rather to be for discontinuing his service and dereliction of duty, for a resignation of office does not only imply the attempt by the officer to surrender that character, but an acceptance of the resignation by the Corporation, otherwise it is incomplete, and after acceptance they would not come well into Court, to enforce a penalty against the defendant, for doing an act in which they had themselves concurred. In this case the plead-

(306) *Grafton*, 1 Mod. 10.

(307) *London v. Vanacre*, 12 Mod. 273. S. C. 1 Ld. Ray. 499.

308) *Cambridge v. Herring*, 1 Lutw. 405.

ings do not admit an acceptance of the resignation: it was objected that the resignation was not complete, because it was without consent of the mayor, but this objection was overruled. I presume that the stronger ground was, that it amounted to a laying down of his office, though no resignation.

By-law
imposing
oath of
office.

309. An oath of office cannot be framed or required to be taken by a by-law, when none is provided by the constitution. Nor though an oath be appointed, can the Corporation empower any one to administer it, if the constitution have not provided an officer; but application must be made to the Chancery, and a *dedimus* obtained to confer on some proper person an authority to administer it.

(3.) *Concerning Admission.*

Concerning
admissions.

There is perhaps no incidental right in any persons of being admitted members of a Corporation, at least none such has obtained the sanction of our tribunals. But charters and prescriptive usage, have frequently conferred what is called an inchoate right of this kind, upon certain classes of persons, and by-laws of Corporations have sometimes given a similar right of admission into certain of their companies, as a compensation for an exclusion from others. The class of ordinances next coming under observation, refer to the regulation of admissions to freedom.

That appli-
cant shall
be approv-
ed.

310. A by-law may make regulations concerning the qualifications of those who have an inchoate right of admission, either to the Corporation generally, or to parti-

(309) *R. v. Dean and Chapter of Dublin*, 1 Str. 539.

(310) *Green v. Durlam*, 1 Bur. 131.

cular companies, members of the municipal constitution. For this purpose it may appoint, that there shall be four annual meetings of the mayor and aldermen, and other persons of the Corporation, most competent to examine the qualification of the candidates, and that their claims shall be made and investigated at three of these meetings; although this is a restraint on the general right of such persons, to be admitted at any proper time, and although it require that no admission shall be made, unless the applicant is approved by such persons, for if they do not approve, a mandamus will be granted, showing the title.

311. Or that indentures of all apprentices, who would by apprenticeship, acquire this inchoate right, shall be enrolled by the town clerk, in one of the books of the Corporation, within a reasonable time after they are made, and that otherwise, no such right shall be acquired by service under them. In this case the time was four months, and seems to have been thought reasonable.

Indentures
enrolled.

312. Or a by-law of a company may require a necessary qualification, as that no surgeon of the company shall take an apprentice who is ignorant of the Latin language, so that a right to freedom may be acquired by service under his indentures: because this is a restraint for the good government of the body, and for public benefit.

Qualifica-
tion for
public good.

313. When the custom is, that no one can be free of the municipality, who is not free of some one of its

Freedom in
what com-
pany.

(311) R. v. Marshall, 2 T. R. 2.

(312) R. v. Comp. of Surgeons, 2 Bur. 896.

(313) Robinson v. Groscourt, 5 Mod. 108. Wannel v. Chamberlain of London, Str. 675. R. v. Harrison, 1 W. B. 372. R. v. Barber Surgeons, 1 Ld. Ray. 584.

companies, although this does not oblige a man to take up his freedom in any particular company. A by-law may require that every candidate for the freedom of the place, shall take up his freedom in the company of that trade, or occupation which he practises. It is for the welfare of the place that all of a certain trade, should be members of the company of that trade, that the masters may have a controul over his conduct, and protect the public from malpractices, which the masters of a different company are incapable of investigating. This appears to have been the original purpose of such institutions, and anciently none could be members but those of the same business.

But there must be a provision exempting from the influence of such by-law all those who have an inchoate right to freedom in other companies by heritage or apprenticeship; for, if the by-law affect them, it requires a particular custom to support it.

314. But a by-law cannot compel those of no trade to take up their freedom in any particular company, neither can they compel those of an occupation, of which there is no company in the place, as a dancing-master in London, to take up his freedom in the company most in unison with it, as that of the minstrels.

Additional
qualifica-
tions.

315. A by-law is void which attempts to impose any unnecessary additional qualification on those who have an inchoate right of admission; as that they shall be worth ten pounds a year, when no such property is previously required.

(314) *Robinson v. Gros court*, 5 Mod. 108.

(315) *R. v. Spencer*, 3 Bur. 1833. *R. v. Tappenden*, 3 East, 191.

316. So if it attempt to restrict the number of persons who may acquire an inchoate right, as if it prohibit freemen to take more than a certain number of apprentices, within a limited time, or to take any apprentices other than the children of freemen.

Restraining acquisition of inchoate right.

317. Neither can a by-law extend the privilege of eligibility to become members of the Corporation: thus if, by the charter, the privilege of being elected burgesses mere freemen, be confined to the inhabitants of the place, a by-law is void, should it pretend to communicate the eligibility to any who are not inhabitants, although by custom before the charter, those who were not inhabitants might have been elected.

Extending right of admission.

(4.) *Concerning Freemen in Particular.*

318. By a by-law a talliage may be levied on the municipality to compel each member to furnish his proportionate share towards the necessary expences to which the Corporation is liable. Such as the expence of keeping up beacons and watch towers in the Cinque Ports, and ancient towns, and this may be done before they are actually in decay, for that must be prevented. Or the expence of erecting courts for the reception of the judges, when the term is appointed to be kept in the town instead of at Westminster. Or the expence of renewing the charter.

Talliage, what good.

319. So an admission fee may be imposed upon the officers of a company, or paid into the general funds

Admission fees.

(316) *R. v. Coopers of Newcastle*, 7 T. R. 548. *R. v. Tappenden*, 3 East, 191.

(317) *Powell v. Regem*, 3 Bro. P. C. 436.

(318) *Winchelsea Case*, T. Ray. 449. *Clark's Case*, 5 Co. 64. *Major del Rippon*, 1 Sid. 282.

(319) *Vintners v. Passey*, 1 Bur. 239. *Taverner's Case*, T. Ray. 447. *Clark's Case*, 5 Mod. 319. *Framework Knitters v. Green*, 1 Ld. Ray. 113.

for its support, and the Court will not enquire as to the reasonableness of its amount. Or the steward may be required on his election, to make a dinner for the general benefit of the company that they may assemble to elect officers or other such business. But a by-law requiring the steward to provide a dinner on the day after his election, for the master, wardens, and assistants, (not including the rest of the company,) or to pay them a fine instead, is void, because it is for the luxury and benefit of a part of the body and not for the general good.

320. Companies are restrained as to imposing fees on the admission of apprentices and journeymen, &c. both on their admission during apprenticeship and after its expiration, by the following statutes :—

* Q. Mysteries?

“No masters, wardens or fellowships of crafts or masters,* or any of them, nor any rulers of fraternities, shall take of any apprentice or any other person or persons, for the entry of any apprentice into their fellowship above the sum of 2s. 6d. upon pain for forfeiture of 40*l.* for every time that they do to the contrary,” half to the king and half to the informer.

321. A by-law of a fellowship imposing a fine of 10*l.* upon a freeman for taking a second apprentice within a limited time after the first, is contrary to this statute and void.

322. So is a by-law requiring that 15 shillings shall be paid for each pair of indentures, of which the master, wardens, &c. shall settle how much the clerk shall have for drawing them, and the rest to go to the use of the

(320) 22 H. 8. c. 4.

(321) R. v. Coopers of Newcastle, 7 T. R. 548.

(322) Nevesley v. Webster, 1 Kenyon Ca. 243. Leathly v. Webster, Say. 252.

company; for unless the amount of the clerk's fee is shown in certain, there is reason to presume a contrivance to obtain more than two shillings and sixpence for the company.

323. "No master, wardens, or fellowships of crafts, nor any of them, nor any rulers of fraternities, guilds, or brotherhoods, shall by any means exact or take of any apprentice or journeyman after his or their years expired, any sum of money or other things, for or concerning his or their freedom or occupation, otherwise than is limited and appointed by 22 H. 8. c. 4. on pain of forfeiting for every offence 40*l*." half to the king and half to the informer.

324. It seems that a by-law by a municipal corporation imposing a fee contrary to these statutes, would be equally void, although such Corporations are not within the words of the statute; for it would be a restriction upon the inchoate right to freedom, otherwise that might be done indirectly for a company, which itself is prohibited doing.

325. When a legal by-law is made for regulating admissions, it may impose a penalty on any corporate officer who has power to admit, for making an admission contrary to such by-law. Penalty on officer for admitting.

326. Except in as much as all the members are liable to contribute to the general charges on the Corporation, and the freemen of a company towards the support of it, the levy of any tax is illegal, and a by- Talliage void.

(323) 28 H. 8. c. 4.

(324) Vide *R. v. Coopers of Newcastle*, 7 T. R. 544.

(325) *Green v. Durham*, 1 Bur. 131.

(326) *Player v. Vere*, T. R. 328.

law pretending to effect it is void ; neither can the king expressly grant a power of this kind, for it is confined to the parliament alone. A by-law therefore, imposing a fine or an annual payment in respect of every cart licensed to be employed in the municipality, is on this account void, although made for limiting the number of carts in pursuance of a custom.

To sustain
private
titles at
public ex-
pence, void.

327. An order or by-law that all suits which any wise concern the Corporation, shall be defended out of the corporate funds is void, and money expended under it misappropriated. For under such pretences the elections of particular members have been supported out of the common stock, which is against law, for every man ought to maintain his election at his own expence. And if the Court of King's Bench or Exchequer discover that such a by-law exists, they will issue an order and injunction against its being put into effect. So if the defendant to an action for the purpose of investigating the jurisdiction of one of the Corporation courts, appear to have been supplied with funds by the Corporation, should the proceedings come before the House of Lords, they will order a committee to enquire what money has been so applied.

Share of
stock liable
to debts to
the Corpo-
ration.

328. A company for mercantile purposes having a joint fund may ordain, that the stock of each member shall be liable for his debts to the company before other creditors, and that it may be seized and detained for such debts. But when creditors claim against such an ordinance, it shall be construed strictly, and unless there have been an order or declaration, that the stock

(327) *Jefferies v. Bolton*, Fortesc. 350. S. C. 11 Mod. 286. S. C. 2 Bro. P. C. 100. *Attorney General v. Liverpool*, 1 Barnard. 237. Sed vide *Colchester v. Lowten*, 1 V. B. 343.

(328) *Child v. Hudson's Bay Company*, 2 P. Wms. 209.

is so detained, it remains subject equally to the claims of other creditors as to those of the company.

329. A company which carries on a joint trade or business, may ordain that no freeman shall carry on the same trade on a separate account. Members not to use same trade separately.

330. "No masters, wardens, and fellowships of crafts or mysteries, or any of them, nor any rulers of guilds or fraternities, shall take upon themselves to make any acts or ordinances to restrain any person or persons to sue to the King's Highness, or to any of his courts, for due remedy to be had in their causes, ne put ne execute any penalty or punishment upon any of them, for any such suit to be made, upon pain of forfeiture of 40*l.* for every time that they do to the contrary." Restraint on suits.

331. Municipal Corporations are not within the words of this statute; but it was only a declaration of the common law, accompanied with a penalty for making such illegal attempts. Corporations, therefore, are not liable to the penalty for prohibiting their members from pursuing the legal remedies beyond their jurisdiction; but all restraints in this respect are void, for no power less than the legislature can exclude the jurisdiction of the superior courts, or deprive the subject of his right to legal redress.

(5.) *Concerning the Government of the place.*

332. A Corporation may regulate the manner of Trade. carrying on trade within the municipality, so far as to

(329) *R. v. Feversham Fishermen*, 8 T. R. 356.

(330) 19 H. 7. c. 7.

(331) *Player v. Archer*, 2 Sid. 121. *London v. Bernardiston*, 1 Lev. 16. *Ballard v. Bennet*, 2 Bur. 778. *Middleton's case*, Dier, 333. a.

prevent monopoly or the sale of unfit commodities, and to insure proper conduct in those who practise it within their jurisdiction.

Monopoly. 333. A by-law that no silk throwster shall work more than a certain number of spindles in a week, was held good, on the ground of preventing monopoly. This may be considered of very doubtful authority; for there is no reason to prevent an individual from extending his trade, according to his means, so he have no exclusive privilege beyond other competitors; and if a by-law may limit them to one member, it may be difficult to say that a limitation to a much smaller number is not legal.

334. On the ground that it tends to a monopoly, a by-law of the Merchant Tailors' Company was held void, which declared that no freeman of the company should put forth more than half of his cloths to be dressed by any other than a member of the fraternity. And so unreasonable is this provision, that a custom to support it were void.

For pre-
venting
fraud in
trade.

335. A by-law like the following is valid, being for the regulation of trade, and the prevention of fraud:—
“If any citizen, freeman, or stranger within the city, put any broad cloth to sale within the city of London, before it be brought to Blackwell Hall, to be viewed and searched, so that it may appear to be saleable, and that hallage be paid for it, scil. one penny for every cloth, he shall forfeit for every cloth 6s. 8d.”

(333) *Freemantle v. Silkthrowsters*, 1 Lev. 229.

(334) *Davenant v. Hurdiss, Moore*, 591.

(335) *Chamberlain of London's Case*, 5 Co. 63. *London v. Vanacre*, 12 Mod. 271.

The following class of by-laws is valid, on the ground that they introduce only such a regulation of trade, as is necessary for the good government of the municipality. Regulation of trade.

336. That no butcher shall slay any beasts, or keep swine or other nuisances within the walls of the city. Nuisances.

337. That there shall be no butchers or tallow chandlers shops in Cheapside.

338. That there shall be only so many taverns and ale-houses.

339. That no one shall make or use a hot-press within the city.

340. That "no butcher within the city of London or its liberties, or the distance of two miles round the city, shall open shop, or expose to sale flesh meat on Sundays."—This by-law was made by a company of butchers, being an incorporation of all persons exercising the trade of butcher within that space, power being given them by the charter to make by-laws, regulating their trade, and the sale of flesh throughout the district. It was held to be binding upon butchers who had not become freemen of the company, in virtue of their local jurisdiction over the trade, and on account

(336) *Pierce v. Bartrum*, Cowp. 270.

(337) *Player v. Jenkins*, 1 Sid. 284. *Bosworth v. Hearne*, C. T. H. 408.

March. 15.

(338) *Player v. Jenkins*, 1 Sid. 284.

(339) 1 Rol. Rep. 5. 3 Salk. 76. 2 Rol. Abr. 365. 9.

(340) *Butchers v. Morey*, 1 H. Bl. 370.

of the public propriety of the regulation. It was contended, that such jurisdiction could not be conferred on a company by charter. But the Court replied that it might as well be granted to a company, as to a municipal corporation.

Renuncia-
tion of pri-
vilege of
trade.

341. A Corporation may by a by-law renounce the privilege of excluding foreigners from trade granted them by statute ; for it is a private advantage, and such a by-law will be presumed from usage to the contrary for a long while, particularly if commencing soon after the grant.

Void.

The following by-laws are all void, being in restraint of trade, and to the oppression of the subject, although some of them might be supported by a special custom to the same effect.

Excluding
foreigners.

342. That no foreigner shall set up or exercise any trade, art, mystery, or manual occupation, within the municipality.

343. That no person inhabiting out of the borough, or not free, shall set forth goods for sale, except victuals on market days, in any market in the borough.

Requiring
apprentice-
ship.

344. That no person shall set up a trade, within the place, unless he had served seven year's apprenticeship.

(341) *Berwick upon Tweed v. Johnson*, Loft. 338. V. tit. 211.

(342) *Bedford v. Fox*, 1 Lutw. 563.

(343) *Parry v. Berry*, Comyns, 269.

(344) *Clothworkers of Ipswich*, Godb. 253. *Norris v. Staps*, Hob. 211.

345. That no person shall set up the trade of weaver within the place, unless he has served an apprenticeship within it, or exercised that trade for five years anterior to the by-law, or unless he be approved by the master and wardens.—This was a by-law of a company empowered to make by-laws for the regulation of their trade, and to whom the charter pretended to give the power of imprisonment, and a particular power to warrant this by-law.

346. That no person exercising the trade of a tailor within the place, should keep any shop or chamber, or exercise the said faculty, or take any apprentice or journeyman till he had presented himself to the master and wardens of the society for the time being, or some three of them, and should prove that he had served seven years at the least, as an apprentice, and before he should be admitted by them to be a sufficient workman, under penalty to the masters &c. of five marks. This by-law was by a company; but the rule were equally applicable to a similar by-law by a Corporation, for this company was empowered to make by-laws for regulating the trade of tailors within the place.

347. A by-law that no one of a particular trade shall be admitted to the freedom of the city, except as freemen of the particular company of which trade he is, unless it be warranted by a particular custom is void.

Requiring admission into a particular Corporation.

(345) *Norris v. Staps, Hutton*, 5. S. C. Moore, 869. S. C. Hob. 211. 1 *Bacon Abr.* 338. 1 *Rol. Rep.* 5. 3 *Salk.* 76.

(346) *Tailors of Ipswich*, 11 Co. 53. S. C. 1 *Rol. Rep.* 4.

(347) *Chamberlain of London v. Compton*, 7 D. R. 601. V. tit. 313. 361.

348. And it seems that although there be such customs as to the prescriptive companies, they cannot be applied to new companies incorporated in the municipality. Sed quære.

Bond in aid
of void by-
law.

349. A bond given by a foreigner to a company in corroboration of such void by-laws, would be equally void for want of legal consideration.

PENALTY.

350. Where the Corporation alone is injured by the offence of the party, the penalty can be made recoverable only by the Corporation itself or its Chamberlain or treasurer for their use. Of this nature is the penalty imposed on freemen for refusing to serve corporate offices, such as that of sheriff or common-council-man. And it is no objection to the competency of either the Court, the sheriffs jurors or witnesses, that they will be entitled to a share of the penalty. For they are a kind of republic, and the penalty may be properly to the use of its government. And so of a company.

IV. BY-LAWS IN AFFIRMANCE OF A PARTICULAR CUSTOM.

One method of enforcing a custom, is to make a by-law in strict pursuance of it, imposing a penalty for breach of the by-law. Ordinances of this kind may of course be valid, in cases where without such custom to

(348) *Chamberlain of London v. Compton*, 7 D.R. 601. *Bolton v. Throgmorton*, Skin. 55. *semb. contra.*

(349) *Tailors of Exeter v. Clarke*, 2 Show. 364.

(350) *Hollings v. Hungerford*, P. 3 Geo. I. cited in *Bodwic v. Fennel*, 1 Wils. 235. *London v. Wood*, 12 Mod. 686. *Hesketh v. Braddock*, 3 Bur. 1856. *Chamberlain of London's Case*, 5 Co. 63. b. *Feltmakers v. Davis*, 1 B. P. 101.

support them they would be void. I shall only speak of such as require this support, for the others fall under the foregoing rules. For the validity of a by-law of this kind, there are several points requisite to be observed. There must be a special custom admitted to be good, although contrary to the common law;—the by-law must strictly follow the custom in every particular;—The penalty of violating the by-law must not exceed that of violating the custom;—it must be pecuniary, and assigned to those only, who might sustain an action on the custom;—it must be recoverable in the same courts, and no other, as the damages on breach of the custom;—It cannot be recoverable by any extraordinary remedy, unless that be supported by a distinct custom.

351. There must be a special custom to sustain the particular by-law; a general custom to amend hard or defective customs, will not support a by-law made for the private emolument of an ancient company, although going to decay; as that all butchers shall take out their freedom in the butchers' company, for the benefit derived to the company from the accession of members; although such regulation may tend to public convenience.

There must be a special custom.

Every legal special custom warrants a by-law which is the same in sense, for the words of the custom, are the expressions of the parties, and may vary in phraseology; but if the by-law vary in substance from the custom shown, and is not legal at common law, it can derive no support from being somewhat similar to the custom.

(351) *Harrison v. Godman*, 1 Bur. 16. *Chamberlain of London v. Compton*, 7 D. R. 601. V. tit. 358. et seq.

By-law,
good,
though va-
rying.

352. Where there is a special custom to warrant it, a by-law is valid, which excludes foreigners from trading within the municipality. If the custom be "that no stranger hath of right exercised the craft of a tailor;" the by-law may provide "that no stranger or foreigner shall exercise the craft of a tailor within the place, except he be first made free."

353. A custom that no foreigner "shall exercise a trade within the place," warrants a by-law "that no foreigner shall open shop there" under a penalty.

354. Where the custom is "that no freeman shall set to work any person being a foreigner to the freedom of the city, in any manual occupation whatsoever," the by-law may be in that form, and it is unnecessary to say "for gain or profit."

When void
for vari-
ance.

355. But a custom that no foreigner shall exercise his trade within the place, does not warrant a by-law that "no foreigner residing within the borough, shall take to his trade, any journeyman, apprentice or boy, unless he dwell within the borough."

356. A custom that no foreigner shall practise the trade of shoemaking, warrants a by-law that no foreigner shall use the art of a shoemaker, but not that no foreigner shall make shoes; for this would exclude him from making shoes for his private use, which a custom cannot restrain.

(352) *Hesketh v. Braddock*, 3 Bur. 1858. *Woolly v. Idle*, 4 Bur. 1952. *Tailors of Bath v. Glazby*, 2 Wils. 266.

(353) *Colchester v. Goodwin*, Carter, 117. 120.

(354) *Bosworth v. Budgen*, 7 Mod. 459.

(355) *Colchester v. Goodwin*, Carter, 117. 120.

(356) *Wood v. Searl*, Bridg. 141.

357. But if the by-law vary from the custom in those respects, in which it can be supported at common law without custom, such variance or excess in no manner affects its validity.

358. A custom that the Corporation has the superintendence and government of carts, has been held sufficient to warrant a by-law limiting the number which should be used ; so there be sufficient for carrying on business. It seems very doubtful whether a special custom is necessary to support such a by-law, for it is a mere regulation of trade to prevent a public nuisance.

Good under a more general custom.

Restraining trade.

359. And the same custom has been held sufficient to support a regulation that no brewers' drays shall be in the public streets after 11 o'clock in the morning, from Lady day to Michaelmas day, or after 1 o'clock in the afternoon from Michaelmas day, to Lady day. But both these by-laws derived additional force from the supposed necessity of the measure for preventing nuisances, although it was considered that a Corporation does not possess so great authority under the general power of making by-laws for the good government of the place.

360. So a custom of regulating the trades within the city, has been held sufficient to sustain a by-law directing that bricklayers shall not plaster with lime

Regulating trade.

(357) *Fazakerley v. Wiltshire*, 1 Str. 466, 467.

(358) *Harrison v. Godman*, 1 Bur. 16. *Player v. Vere*, T. Ray. 288.

328. *Player v. Jenkins*, 1 Sid. 284. no special custom noticed.

(359) *Bosworth v. Hearne*, Andr. 97. S. C. 2 Str. 1085. S. C. C.T.H.

408. *Player v. Jones*, 1 Vent. 21. *Broadnax Ca.* 1 Vent. 196. (adjorn.)

(360) *Bricklayers and Plasterers*, Palm. 395. S. C. Hardres, 56.

and hair, but with lime and sand only, and that plastering with lime and hair shall belong to the plasterers.

Regulating
admission,
good.

361. The customs set forth were—that there are several guilds which have used to have the superintendence of the persons exercising the trades belonging to such guilds, in the exercise of such trades within the city;—that the said several guilds have been and ought to be under the regulation of the mayor, aldermen, and commonalty of the city in common council;—that every person at the time of admission into the freedom of the city be free of some one of the said guilds, and be admitted into the freedom of the city as a freeman of such guild;—that no person not free of the city, may sell by retail, or keep any shop for retail sale, or use any occupation for hire, gain or sale within the city;—that if any customs prevailing in the city, be difficult or defective in any part; or if any things newly arising in the city, where a remedy is not already ordained, should want amendment, the mayor, &c. in the common council may ordain an apt and proportionate remedy for the common benefit of the citizens of the city and other persons resorting thither;—and that there is an ancient guild of butchers within the city, one of the said guilds.—These were held sufficient to warrant a by-law made by the mayor, &c. in common council of which the substance is, “Whereas the guild of butchers, &c. is an ancient guild, and whereas persons exercising the trade of butchers have obtained their freedoms in other guilds, whereby the guild of butchers is diminished, and many fall into decay; for remedy thereof, it is ordained by the mayor, &c. that after a certain day, every per-

(361) *Wannel v. London*, 1 Str. 675. *R. v. Ludlow*, 8 Mod. 270. *Harrison v. Godman*, 1 Bur. 16. *R. v. Harrison*, 3 Bur. 1323. S. C. 1 W. B. 372. *Chamberlain of London v. Compton*, 7 D. R. 601. V. tit. 313.

son who is not already free, who shall exercise the trade of a butcher within the city, shall be made a freeman of the guild of butchers, and no such person shall after that day be admitted by the chamberlain to the freedom of the city, as of any other guild than the guild of butchers; provided that any person who shall be entitled to be admitted to the freedom of any other guild, shall be admitted to the freedom of the guild of butchers on payment of the like fine and fees, and no more as are payable on admission of one so entitled to the freedom of the company in which he is entitled to admission." And upon such customs similar regulations as to other trades have been held legal. Some difficulty had arisen from the vague manner in which several of those cases had been reported, and it was apprehended that such a by-law might be sustained on the incidental power of municipal legislation; but all doubt is set at rest by a recent decision. It may be observed that this by-law gives those who had an inchoate title to admission in any other company, a right to compel their admission into the particular company by writ of mandamus.

362. But under such customs a by-law requiring that a person of an occupation of which there is no guild in the municipality, shall be admitted into a particular guild, being that most consonant with his occupation is void.

363. And it seems that a by-law requiring those already free of the city to take up their freedom in the company of their particular trade cannot be sustained by these customs.

(362) *Robinson v. Gros court*, 5 Mod. 108.

(363) *Harrison v. Godman*, 1 Bur. 16. *R. v. Harrison*, 3 Bur. 1325.

For regulation of prescriptive franchise.

364. So a custom of London by which the right of portage of corn, &c. within certain limits, partly within and partly beyond the boundaries of the city, belongs to the Corporation, will warrant a by-law ordaining that there shall be a company of free porters with twenty four assistants and four hundred free porters, who shall work at stated rates, and that none but the free porters shall intermeddle with the importing or exporting of any corn, &c. within the franchise except in case of danger, necessity, or perishable goods. For having accepted the franchise, they must provide for the proper management of it, and to the custom is incident a power of making by-laws for its regulation. It is no objection that by forming this association the rest of the freemen are excluded, for not only their assent is implied in the by-law, but it is for the general benefit that proper and known persons should be appointed. It is no objection that foreigners are bound, for if they come within the franchise they are liable to its regulations.*

The exception of necessity and perishable goods is

(364) *Fazakerley v. Wiltshire*, 1 Str. 466. 469. S. C. 11 Mod. 353. *Cudden v. Eswick*, 1 Salk. 143. 192. S. C. 6 Mod. 123.

* Perhaps this observation is not very correct, for beyond the city the franchise is attended with no local jurisdiction, and the case appears to have been based on an ambiguous foundation. The better reason is, that the franchise is a right of property vested in the Corporation by prescription, and such right they have power to regulate for their private profit, so the public convenience is not impeded. If this be correct, foreigners are not bound on account of any jurisdiction in the Corporation, but in the same manner as a stranger must use the ancient ferry, where one is established.

proper for such a franchise cannot be granted or held to the public inconvenience. The appointment of a certain rate of wages excludes an implication that the merchant is not allowed to employ his own servants instead of the free porters. If there be not sufficient free porters in attendance any person may be employed : and if from the Corporation neglecting to provide a sufficient number, any person sustain an injury he may maintain an action on the case against them.

365. Although it is said that the by-law must strictly follow the custom, yet if the custom extend only to the city, the by-law may extend to the liberties and suburbs. At least until the contrary is shown, the court will not presume that the liberties and suburbs are beyond the municipal jurisdiction of the city, but that they are part of the same. Extent.

366. If the custom be laid as existing in a borough, the by-law may use the word Vill or Town which shall be intended coextensive.

367. But a custom laid in the "city of Exeter" does not warrant a by-law to extend through the "city and county of Exeter." This by-law was made by a company who claimed jurisdiction by custom to make by-laws for the government of the trade "in the city."

(365) *Bosworth v. Budgen*, 7 Mod. 460. *London v. Vanacre*, 12 Mod. 272. *Colchester v. Goodwin*, Carter, 121.

(366) *Colchester v. Goodwin*, Carter, 118. 121.

(367) *Wood v. Searl*, Bridg. 140.

PENALTY OF BY-LAW ON CUSTOM.

368. The method of enforcing such by-laws is by imposing a penalty on those who break them; which must be reasonable, or the by-law is not sustained by the custom; for the penalty is in the nature of liquidated damages, and stands instead of such damages as would be assessed by the jury in an action of trespass founded on the custom. It is impossible to lay down any rule as to what is a reasonable penalty, it must be determined on all the circumstances of the case. 20s. was held reasonable for acting as a porter contrary to the privilege of the free porters of London. 5*l.* for violating the privilege of London excluding freemen from employing foreigners in any manual occupation. The same sum for keeping shop by a foreigner. It is not necessary that the penalty be proportionate to the value of the goods with which the offence is committed, for the by-law will not be void on that account only. 3*s.* 4*d.* a day was considered reasonable for a foreigner exercising the business of a taylor. But a penalty, although small, fixed on every stroke of the hammer which a foreigner shall use in his trade of a goldsmith, is unreasonable. And the penalty must not only be reasonable, but it must be certain, and if the by-law leave the admeasurement of it to the discretion of the governing part of the company to whose use it is recoverable, it is void, for that would be allowing the plaintiff to assess his own damages.

(368) *Fazakerley v. Wiltshire*, 1 Str. 462. *Bosworth v. Budgen*, 7 Mod. 459. *City of London's Case*, 8 Co. 125. a. *Woolly v. Idle*, 4 Bur. 1952. *London v. Bernardiston*, 1 Lev. 15. *Hesketh v. Braddock*, 3 Bur. 1853. *Wood v. Searl, Bridg.* 141.

369. The penalty must be imposed on the person On whom. who commits the violation. If a by-law be made, confining the exercise of the right of portorage (belonging to the corporation) to a certain body of free porters, the penalty imposed for breach of it must be on the person who acts as a porter in defiance of the ordinance, and cannot be fixed on the person who employs him, for he does not know who is or is not a free porter.

370. So the penalty of selling goods by a foreigner within the city, must be imposed on the seller, and not on the buyer; for how can he distinguish between freemen and others?

371. The penalty must be made recoverable by those By whom recoverable. who sustain the injury from violation of the custom; for the by-law cannot transfer the right of action to others. If therefore the injury be to all the freemen, the penalty must be payable to the Corporation at large, and made recoverable in their name only, or at the utmost in the name of their treasurer or chamberlain to their use. The rule may be laid down as invariable, that the penalty can be given to them alone who can sustain an action on the custom.

372. But where the forfeiture under the custom was for the benefit of the Corporation under their ancient

(369) *Fazakerley v. Wiltshire*, 1 Str. 469. V. tit. 364. *Cudden v. Estwick*, 1 Salk. 143. 192. S. C. 6 Mod. 124.

(370) *Cudden v. Estwick*, ut sup.

(371) V. tit. 182. *Wood v. London*, 1 Salk. 397. *Chamberlain of London's Case*, 5 Co. 63. b. *Fazakerley v. Wiltshire*, 1 Str. 468. S. C. 11 Mod. 353. *Cudden v. Estwick*, 6 Mod. 123. *London v. Green*, 8 Mod. 212. *Colchester v. Goodwin, Carter*, 122. *Bodwic v. Fennel*, 1 Wils. 237. *Berwick v. Johnson*, Loft. 337. *Hesketh v. Braddock*, 3 Bur. 1848. *Woolly v. Idle*, 4 Bur. 1952.

(372) *Colchester v. Goodwin, Carter*, 122.

name of bailiff and commonalty, the by-law should give it to the same body under their present name of mayor and burgesses, if so called by the last charter.

373. The by-law gave the penalty for trading against a custom excluding foreigners, to be recovered by the chamberlain, one third of it for the benefit of the prisoners of the gaol, another third part for the informer, and the other third remaining undisposed of was for the use of the Corporation. No exception was taken to this distribution of the penalty, and it appears to be unexceptionable, for the division is subsequent to the recovery, and no injury to the defendant.

374. The by-law gave the penalty to any one who would, sue and held void because it was an attempt to transfer the right of action.

375. If the injury be to a particular company, as where the custom excludes foreigners from the practice of a particular trade, or from the practice of the trade of a certain company, as well freemen as foreigners, unless free of that company, the penalty of the by-law ought not to be given to the municipal Corporation or their officer, but to the company injured, or their treasurers in trust for them.

Not suable
in municipal
court by
Corporation.

376. If the penalty be made recoverable by the Corporation, in their corporate name, it cannot be sued for

(373) *Hesketh v. Braddock*, 3 Bur. 1848. *Player v. Archer*, 2 Sid. 121.

(374) *Bodwic v. Fennel*, 1 Wils. 237. V. tit. 182.

(375) *Wilton v. Wilks*, 2 Ld. Ray. 1133. V. tit. 184, 185. *Woolly v. Idle*, 4 Bur. 1951. *York v. Wellbank*, 4 B. A. 440. *Sed vide Tailors of Bath v. Glazby*, 2 Wils. 266.

(376) *London v. Wood*, 12 Mod. 674. *Ballard v. Bennet*, 2 Bur. 777. *London v. Bernardiston*, 1 Lev. 17. C. *Player v. Archer*, 2 Sid. 121. *Hesketh v. Braddock*, 3 Bur. 1858. A. *Middleton's Ca. Die*, 333. a.

in the municipal court, for they would be both party and judge. If the by-law declare that it shall be recoverable in that court, it seems that in so much it is void, yet not void in toto, and that an action may be prosecuted on it in the common law courts. But if the by-law declare that it shall be recoverable in the Corporation court and in no other, it is void altogether, and they have no remedy upon it; but as it is in itself unnecessary, they are not precluded from maintaining their action on the case for violation of the custom in the Courts of Westminster Hall.

377. If the penalty be made recoverable by the chamberlain, it seems that he cannot sue in the municipal court; for there is an interest in the judges, the sheriff, and the jury, to support the custom against the defendant. In which respect proceedings on by-laws founded on exclusive customs, differ from those which relate to freemen alone.

Nor of
chamber-
lain, &c.

378. If the penalty imposed, be for violating a custom to the injury of a particular company, and given to that company or its masters in trust for them, it may be made recoverable in the Corporation courts; for the Corporation is no party, and has no general interest in the question.

But it is by
a Company.

379. The penalty may be enforced by the same and no other process, as a penalty imposed under a general power of making by-laws, the consideration of this question is therefore referred to that part of the treatise. There is one case however, more particularly

By what
means levi-
able.

(377) Vid. tit. 186. and the authorities there cited.

(378) Bodwic v. Fennel, 1 Wils. 237.

(379) Doggerill v. Pokes, Moore, 411. V. tit. 316.

applicable to a custom. Where there is a custom to exclude foreigners from exercising trades, a by-law that if a freeman take the son of a foreigner to be his apprentice, "the bond and covenants shall be void," cannot be supported; for though it might have imposed a penalty on the freeman, it cannot avoid a contract between him and another party.—But this by-law had been void even under a penalty.

What custom will not support a by-law.

380. It is not on every custom, that a by-law can be supported; indeed, it appears to have been by a relaxation of the common law, that any by-law was allowed to be made by a Corporation, which should levy a penalty on foreigners for invasion of their privilege. Corporations ought rather to have been left to their remedy at common law upon the custom, when a jury might assess the damage. But this principle was allowed to be trespassed upon, perhaps for two considerations. The penalties of the by-laws have been usually quite as moderate as the amount of the damages which in all probability a jury would have given in an action on the case, so that no injury has been done. And further, as these by-laws affect only strangers, establishing themselves within the municipality, they may have been supposed to derive sanction from the general jurisdiction vested in Corporations over the people of the place. It appears however, that when the custom is more properly a prescriptive right of property, although a by-law may be warranted by it, which excludes as well freemen as foreigners, from participating in the enjoyment of that right, it is warranted no further, and that a by-law is void which imposes a penalty on foreigners for non-payment of toll claimed by the Corporation, or for employing a porter within

(380) *Player v. Archer*, 2 Sid. 121. *Cudden v. Estwick*, 1 Salk. 143. 192. S. C. 6 Mod. 124.

a district, through which a Corporation has the franchise of free portorage. I apprehend such prescriptive rights in a body politic, in no circumstance differ from similar rights in an individual; and though they may govern their own servants, their only remedy against those who contend against, or violate their right, is in the Courts, and according to the forms of the common law.

V. HOW BY-LAWS SHALL BE CONSTRUED.

381. A by-law must be consonant with the law of the land, and if not so it is void, although the charter contain an express power of making such a by-law; for in so much the charter itself is void; and although it have not been repealed, the illegality of such clause may be taken advantage of, by plea to an action founded on a by-law made in pursuance of it. It has been already observed, that no unreasonable by-law is warranted by a general custom to make by-laws. The rule may be laid down generally, that neither a power conferred by charter, nor a general custom to make by-laws, will give an ordinance any greater claim to validity, than if it had been made under the incidental power in every Corporation. As to by-laws warranted by special custom, they have been already discussed in so much as they exceed the ordinary rule.

Reason-
able.

382. A by-law shall have a reasonable construction, and its terms shall not be strictly scrutinized, for the purpose of making it void. On this ground where there

To be con-
strued libe-
rally.

(381) Tailors of Ipswich, 1 Rol. 5. S. C. 11 Rep. 54. a. Norris v. Staps, Hob. 211. 3 Salk. 77, 78.

(382) Vintners v. Passey, 1 Bur. 239. Workingham v. Johnson, C. T. H. 285.

are two classes of burgesses, that is, capital and secondary, the "former to be elected from among the latter" and the "latter out of the inhabitants at large," a by-law was held valid, which imposed a penalty "on any inhabitant refusing to become a burgess." For although the word Burgess comprehends both classes, and on that ground, the by-law would be void, for inconsistency, since inhabitants cannot become capital burgesses; yet by a liberal construction, it was intended to refer only to secondary burgesses, to which office all inhabitants are eligible.

Of by-laws
on custom.

383. So a by-law (founded on a custom) that no foreigner residing within the place, should employ any non-resident journeyman, apprentice or boy, in his trade is good, for it shall not be construed to signify, that he shall not employ a non-resident barber or tailor in their occupation as his personal servants.

When void
in toto.

384. If a by-law be entire, each part having a general influence over the rest, and one part of it be void, the entire by-law is void. As, if instead of being restrained to those within the jurisdiction, it comprehends those also over whom there is no authority to legislate, it is void not only as to strangers, but also as to the free-men.

385. Of this kind was a by-law of the university of Oxford, that whoever is abroad in the streets, after nine o'clock, whether privileged or not privileged, shall be liable to a penalty. Semb.

(383) Colchester v. Goodwin, Carter, 119, 120.

(384) Dodwell v. Oxford, 2 Vent. 34.

386. So is a by-law that "if any person" duly elected, shall refuse the corporate office, he shall forfeit, &c. for "any person" comprehends strangers who are ineligible, as well as the citizens, who are alone liable to serve, and the word "duly" is applicable to the form of election, and not the qualification of the elected.

387. Of the same character is a by-law prohibiting a nuisance, and proceeding to impose a talliage for private emolument; as that there shall be only a certain number of carts allowed, and for each cart licensed an annual rent shall be paid, to a particular Corporation for its private emolument.

388. For the same reason, if the by-law empower the levy of the penalty to be by distress and sale, where there is a custom to warrant the distress, but not the sale, being void as to the sale, it is void in toto, and the distress is a trespass ab initio.

389. But if a by-law consist of several distinct and independent parts, although one or more of them may be void, the rest are equally valid as though the void clauses had been omitted. It was at one time considered that this observation was applicable only to a body of by-laws, of which, although one or more of the distinct ordinances were void, the validity of the rest is unaffected. But it appears to be now well established, that the rule is applicable to the different clauses

Void in
part.

(386) *Oxford v. Wildgoose*, 3 Lev. 293. *Guildford v. Clarke*, 2 Vent. 248.

(387) *R. v. Feversham*, 8 T. R. 356. *Player v. Vere*, T. Ray. 328. *Clarke v. Tucker*, 2 Vent. 183. *R. v. Spencer*, 3 Bur. 1839.

(388) *Clarke v. Tucker*, 3 Lev. 282. *Lee v. Wallis*, 1 Kenyon Ca. 295.

(389) *Fazakerley v. Wiltshire*, 11 Mod. 353. *S. C.* 1 Str. 469. *Lee v. Wallis*, 1 Kenyon, 295. *R. v. Feversham*, 8 T. R. 356.

of the same by-law; for when it consists of several particulars, it is to all purposes as several by-laws, though the provisions are thrown together under the form of one.

Power
granted by
by-law
leaves dis-
cretion.

390. If a by-law empower a select body to do a particular act, it is not imperative on them, but leaves a discretion, and does not communicate to those for whose benefit it might be exercised, a right to compel performance. For this reason it is not obligatory on a select body to admit certain classes of persons, whom a by-law has declared that it "shall be lawful" for them to admit to the freedom at appointed times.

Confers no
right on
those for
whose be-
nefit it may
be exercis-
ed.

391. If a by-law appoint a select body to examine and approve candidates for admission to the freedom, their examination and approval does not confer a right to be admitted, but the company is as free to refuse admission as before the examination.

Confirma-
tion.

392. For the purpose of controlling fraternities and guilds, the misconduct of which, during that reign called for the frequent interference of the legislature, it was appointed that their ordinances should be submitted to the inspection of the judges.

393. "No masters, wardens, and fellowships of crafts, or mysteries, nor any of them, nor any rulers of guilds or fraternities, shall take upon them to make any acts or ordinances, ne to execute any acts or ordinances by them heretofore made in disheritance or diminution of

(390) R. v. Eye, 4 B. A. 272. S. C. 2 D. R. 174.

(391) R. v. Askew, 4 Bur. 2190.

(392) 19 H. 7. c. 7.

the prerogative of the King, nor of other nor against the common profit of the people. But that the same acts or ordinances be examined and approved by the chancellor, treasurer of England, or chief justices of either benches, or three of them, or before both the justices of assize in their circuit or progress in that shire where such acts or ordinances be made upon pain of forfeiture of 40*l.* for every time that they do to the contrary."

394. This statute is confined to guilds and fraternities, and does not extend to municipal Corporations: it was enacted to prevent companies from harrassing the poorer classes of tradesmen and apprentices, for whom the law offered but an unavailable and expensive remedy. Its beneficial effect has been frequently lost to the people, by the negligence of the judges, at particular times, which has allowed by-laws to bear the appearance of judicial sanction, in the eyes of the ignorant, and to be made the means of oppression. Holt C. J. observed, that reasonable by-laws need not that sanction, and that those which are unreasonable, derive no force from it, for they are brought to the judges on their circuits, and allowed as matter of course; but Lord Kenyon used a language more becoming the character of officers, who constitute the supreme tribunal for the prevention as well as redress of civil injuries: he said that he had refused to allow them when they contained illegal provisions.

(394) *Chamberlain of London's Case*, 5 Co. 63. b. *Tailors of Ipswich* Ca. 11 Co. 54. b. *Davenant v. Hurd*, 1 Mo. 576. *Brownl. and Gould*, 48. 1 Rol. Abr. 363. l. 35. *Stationers v. Salisbury*, Comb. 222. *R. v. Coopers of Newcastle*, 7 T. R. 548.

395. But unless the by-laws of a company have been allowed, they cannot be enforced without incurring a penalty of 40*l*.

IV. HOW ENFORCED.

By debt or
assumpsit.

396. The first and general method of enforcing a by-law is by bringing an action of debt or assumpsit, to recover the penalty imposed by it.

Who may
be plaintiff.

397. The plaintiff is that person or body politic alone to whom the penalty is given by the by-law. Therefore if the penalty be given to the master and wardens of a company, to the use of the masters, wardens and company, the action cannot be sustained in the name of the master, wardens and company, but must be brought in that of the master and wardens alone, and they would probably declare both in their natural and official capacities. So where the penalty is given to the chamberlain for the use of the Corporation, the action must be brought in the name of the chamberlain, and not in that of the Corporation.

Title of
plaintiff.

398. If the chamberlain sue for the penalty, it is sufficient for him to aver generally that he is chamberlain without setting out his election or appointment.

Corpora-
tion.

399. If the penalty be given to the Corporation, which must be in their corporate name, or to the mayor,

(395) Tailors of Ipswich, 11 Co. 54. b. 1 Rol. Abr. 363. 1. 37.

(396) Adley v. Reeves, 2 M. S. 60. Woolly v. Idle, 4 Bur. 1952. Barber Surgeons v. Pelson, 2 Lev. 252. Lee v. Willis, 1 Kenyon, 295. Tidd Prac. 3, 4. Feltmakers v. Davis, 1 B. P. 98.

(397) Feltmakers v. Davis, 1 B. P. 101.

(398) Harris v. Wakeman, Say. 255.

(399) Wood v. London, 1 Salk. 398. S. C. 12 Mod. 672. 675. 687.

the action cannot be brought in the court of mayor and aldermen, or any other corporate court, in which the mayor presides either personally or by deputy, although the Court be held by the recorder alone, who represents as well the mayor as all the other corporators enumerated in the style of the Court; for he would appear in the characters of judge and party, which is inconsistent with all rules of law.

400. But if one of several judges of the Court, as an alderman of the Court of mayor and aldermen, bring the action, it may be supported in the Court of the Corporation, because the alderman may retire, which, where the mayor and aldermen actually sit, is indeed necessary, and the Court is still competent to proceed.

One of the
corporate
judges.

401, The chamberlain, treasurer, or other officer suing for the use of the Corporation, may institute the proceedings in the Corporation Court; for the Court has jurisdiction over all those who are bound by the by-law, and is the proper tribunal for enforcing its ordinances for the welfare of the body politic, and the good government of the municipality. In these cases, freemen of the Corporation may either impanel or serve on the jury, or be witnesses to support the charge. This observation has no relation to proceedings on a by-law to enforce customs against common right, of which I have already spoken. The distinction between the case of a by-law made under the general power and that founded on a custom is, that in the first instance the freemen are enforcing against either a fellow-freeman or an inhabitant,

Chamber-
lain or
treasurer.

(400) Wood v. London, 1 Salk. 398. S. C. 12 Mod. 688. R. v. Rogers, 2 Ld. Ray. 778.

(401) Bosworth v. Budgen, 7 Mod. 461. R. v. Rogers, 2 Ld. Ray. 778. London v. Wood, 12 Mod. 686, 7. V. tit. 186.

an ordinance to which they are equally liable, and may be a precedent for punishing themselves, and the interest which they have in the penalty is both indirect and too minute to influence their opinion; whereas in proceedings on a by-law founded on a custom, they not only have an interest in supporting the custom which excludes foreigners from competition in trade, but they are enforcing a law by which they are not themselves bound, and the punishment of the defendant can never be a precedent against them.

402. A by-law cannot declare that the penalty shall be recoverable in the Court of the Corporation, "and not elsewhere;" at least the restriction is void, and the superior Courts are not excluded. Yet the by-law may make the penalty recoverable in the Corporation Court (though the provision is unnecessary), and also declare that no essoign shall be allowed; for this is consonant with the general law.

Custom not
pleaded.

403. When an action on a by-law founded on a custom is brought in the Court of the municipality, the custom should not be set forth in the declaration; for the Court must take judicial notice of the customs, for they are the *lex loci*.

Incompetent
Court.

404. When a Court entertains the cause without having any jurisdiction over it, the defendant may obtain his remedy by moving the Court of King's Bench for a prohibition, on which the question of jurisdiction will be examined, and if they have a right to try the cause

(402) *London v. Bernardiston*, 1 Lev. 16. *Player v. Archer*, 2 Sid. 121. *Ballard v. Bennet*, 2 Bur. 778. V. tit. 376.

(403) *Broadnax Case*, 1 Vent. 196. V. tit. 194.

(404) *Jeffs v. Bolton*, Fortesc. 350. S. C. 11 Mod. 286. S. C. Bro. P. C. 100. S. C. 1 Str. 118. *Dodwell v. Oxford*, 2 Vent. 33. *Tidd's Prac.* 399.

a concilium will be awarded, otherwise a prohibition. Or the jurisdiction of an inferior Court may be examined on a certiorari.

405. On return to the writ of habeas corpus cum causâ, from the city of London, the Court will allow the by-law to be objected to on showing cause against the issuing of a procedendo, on account of the particular methods of recovery, established and allowed by the customs of that city, which cannot be pursued in the Courts above. For which reason, the persons to whom the writ is issued must show a good cause of detainer; and if the Courts of Westminster cannot proceed in the manner in which the customs of London authorize the city Courts to proceed, that is a good cause: therefore the Court will investigate the validity of the by-law, to see whether such be the case, and if it be found bad, the party shall be discharged. Another reason is, that no writ of error lies from London into the King's Bench.

Return of
habeas cor-
pus in Lon-
don.

406. In all other cities and Corporations, if habeas corpus cum causâ issue, and the by-law be returned as the foundation of the action below, the method is not for the defendant to object to the by-law, upon motion, but the plaintiff must begin de novo, and declare over again in the superior Court, upon which the defendant may demur, if he have any objection to the validity of the by-law. In this case, Denison J. observed, that there may be a method of getting rid of the habeas corpus, but that he would not point out the method of doing it.

Elsewhere.

(405) *Ballard v. Bennett*, 2 Bur. 777. 779. S. C. *R. v. Chamberlains of Worcester*, 2 Kenyon, 472. *R. v. Glamorganshire*, 1 L. Ray. 581. *London v. Wood*, 12 Mod. 689. Tidd. Prac. 399. 411. 412.

(406) *Ballard v. Bennet*, 2 Bur. 777. 779. S. C. *R. v. Chamberlains of Worcester*, 2 Kenyon, 472. Tidd. Prac. 399. 411.

Certiorari,
London.

407. No certiorari lies to the Court of mayor and aldermen of London, but a writ of error before commissioners appointed to examine the errors, returnable before the king in parliament, from which error lies in the House of Lords. Yet the case of *Player v. Archer* was brought from the court of aldermen upon certiorari, into Westminster Hall, and it was there said, that if either of the parties were judge, the cause might be removed and tried in Westminster Hall; and a *procedendo* was denied, for the by-law was made on a custom by which the Corporation claimed a toll; wherefore Glynn, Chief Justice, said, that it ought not to be tried in London, but in Surrey or Middlesex.

Elsewhere.

408. From the Courts of other municipalities, the cause may be removed by certiorari, as other causes from inferior Courts.

409. But it seems that certiorari lies from the sheriff's court, into Westminster Hall, and also to remove from the court of mayor and aldermen, a cause removed into that court from the sheriff's court, by *levata querela*, according to the custom of London.

When
made.

410. The body cannot be removed by *habeas corpus*, until the party is in actual or virtual custody; for the Court below cannot obey the writ, until it has possession of the body, which it has when common bail is filed, but not on mere entering of an appearance. And the removal is not perfected until the defendant has put in and justified bail above, when the plaintiff may re-

(407) *London v. Wood*, 12 Mod. 686. *Green v. Cole*, 2 Saund. 252. 1 Lev. 310. *Player v. Archer*, 2 Sid. 105. 121.

(409) *Dorrington v. Edwin*, Skin. 244.

(410) *Mitchell v. Mitcheson*, 1 B. C. 514. *Clack v. Dickson*, 3 M. S. 94.

linquish his proceedings, if he have not delivered a declaration in the superior court.

411. If the writ be delivered before the plaintiff has declared, he ought to put in his declaration immediately, that it may be returned with the other proceedings, and the writ; for it is necessary that all the proceedings appear before the Court, that they may see the cause of action. Return of proceedings.

412. If the plaint in the City of London, be founded on a custom without any by-law, that custom must be returned with the cause to the writ of habeas corpus, in the same manner as a by-law. The contrary was argued by counsel, as being the practice; but the Court required the custom to be set forth. This rule does not, perhaps, hold as to such customs as have been already certified into the same Court. Return of custom.

413. If it be founded on a by-law, which is good at common law, it is not necessary to set forth any particular custom. But if on a by-law founded on a special custom, unless both the special custom and by-law be set forth in certain, the Court will not take judicial notice of the custom, and a procedendo will be denied. So if the by-law be founded on a private act of parliament confined to the City, or to any trade in it, a bare Of by-law.

(411) *Watson v. Clarke*, Carth. 75. S. C. Comb. 138.

(412) *Watson v. Clarke*, Comb. 138. S. C. Carth. 75. *Robinson v. Gros court*, 5 Mod. 104. *Hartop v. Hoare*, 2 Str. 1187. *Broadnax Case*, 1 Vent. 196. *Spink v. Tenant*, 1 Rol. R. 106. *Fazakerley v. Baldo*, 6 Mod. 177. *Vintners v. Clerke*, 5 Mod. 156. 320. *Ex-parte Eden*, 2 M. S. 228.

(413) *Swallow v. London*, 1 Sid. 287. *Robinson v. Gros court*, 5 Mod. 104. *Fazakerley v. Baldo*, 6 Mod. 177. *Harrison v. Godman*, 1 Bur. 12. *R. v. Harrison*, 3 Bur. 1323. *Chamberlain of London v. Compton*, 7 D. R. 601, 602.

recital is not sufficient, but the act of parliament must be set forth.

414. This defect is not saved by setting forth a general custom to ordain fit remedy, where any custom is bad or defective, or any thing newly arising shall need amendment.

Justification under.

415. The return of a custom of London, to commit to their officer, must show that he who has the custody is their officer. If the return be made by the sheriff, the Court will judicially notice that he is the officer of the City, and it need not be averred; but if it be made by the keeper of Newgate, the Court will not notice him as the city officer, unless it appear on the face of the return.

Return—no plea to.

416. The defendant cannot plead to the return, even a privilege of exemption by prescription or charter, being within the jurisdiction, but the Court will direct that a suggestion of such exemption shall be entered, and after the entry, a writ of privilege will be awarded, to which the city must make their return. If the return is not insufficient on the face of it, it must be allowed, and a procedendo granted; but the defendant may have his action for a false return.

Form of the return.

417. Upon habeas corpus, the record itself is not sent up as on certiorari, but the return must show the

(414) Chamberlain of London v. Compton, 7 D. R. 601, 2.

(415) Vintners v. Clerke, 5 Mod. 157. S. C. Comb. 412. S. C. 12 Mod. 114. 5 Mod. 162. 320.

(416) Swallow v. London, 1 Sid. 288.

(417) 2 Rol. Abr. 69. Chamberlain of London's Case, 5 Co. 63. b. London v. Wood, 12 Mod. 686. Fazakerley v. Baldoe, 6 Mod. 178. Watson v. Clarke, Comb. 138. Harrison v. Alexander, Say. 156. Pope v. Vaux, 2 W. B. 1060. Beard v. Webb, 2 B. P. 93. Cart v. Mogg, Comb. 86.

cause of detaining the body, and contain a history of the proceedings; and if upon investigation of the custom or by-law, a good cause of detainer appear, a procedendo is awarded, although the Court above might have entertained the action, and afforded ample remedy had it been originally brought before them. For the cause itself not being removed, the Court are not in possession of the proceedings, in the same manner as upon certiorari or writ of error. They will not examine the jurisdiction of the city, as to whether the action is brought in the proper Court, or any other part of the proceedings; if these be disputed by the defendant, he may have a writ of error before commissioners assigned by the King to examine the exception, for this writ does not lie from London into the Courts of Westminster Hall.

418. The Court will not allow an amendment in the substance of the return; as by introducing particular customs in support of the by-law set forth, or by setting out an act of parliament, by which its validity may be supported, if they had been omitted at first; or for the purpose of showing that the defendant is within the custom in which the return was defective. Amendment.

419. But where the declaration had not been filed before the return was made, the Court allowed an amendment by ordering that it should be filed and returned, in a case where the action would have been otherwise lost.

420. If it appear proper, on awarding a procedendo, the Court will direct that the matter be found specially, Interference of the Court.

(418) *Chamberlain of London v. Compton*, 7 D. R. 603. *Ex-parte Eden*, 2 M. S. 230.

(419) *Watson v. Clarke*, Carth. 75. S. C. Comb. 138.

(420) *Swallow v. London*, 1 Sid. 288.

or that any other particular shall be observed, which may be necessary to the justice of the case.

Return in-
sufficient.

421. If the custom or by-law be void, the defendant must be dismissed; for the habeas corpus ties up the hands of the City Court, so that all proceedings before a procedendo awarded are illegal and a contempt.

Action for
false re-
turn.

422. If the defendant would proceed against the city for a false return, on application to the Court, they will order the return to be filed; for an action does not lie until the return has been allowed on record, and the filing of it does not prevent a procedendo from being awarded, because the original record is not sent up on habeas corpus, as on certiorari, but the return sets forth a history of the proceedings. Otherwise it could not be filed, in as much as that would preclude the issuing of a procedendo; for the Court above never sends back a record after it has been filed with them.

VII. HOW PLEADED.

Custom set
out.

423. In an action in the superior courts, the declaration must set out particularly the custom on which the by-law is founded; for otherwise the court will not take notice of it, and if the by-law cannot be established without such particular custom, the action must fall. As to other methods of enforcing by-laws, vide p. 179.

By-law set
out.

424. If the by-law be made under the incidental power in the body at large, it is not necessary to set forth the authority of the Corporation to make it; but if made under a special power of making by-laws that must

Authority.

(421) *Fazakerley v. Baldoe*, 6 Mod. 177. S. C. 1 Salk. 352.

(422) *Fazakerley v. Baldoe*, 6 Mod. 177. S. C. 1 Salk. 352.

(424) *R. v. Decan' et Cap. Dublin*, 1 Str. 539. *Feltmakers v. Davis*, 1 B. P. 100. *R. v. Lyme Regis*, Doug. 154.

be shown in the pleadings, and also that it was made by the body in whom such power is reposed, and at what time it was so made.

425. The by-law itself must be set out fully in an action of debt upon it, and not by way of recital; therefore it is not sufficient to aver that the defendant incurred the penalty by virtue of a certain by-law for having refused the office: but this latter averment appears to be sufficient in an action of assumpsit founded upon the same by-law; for in that form of action a greater latitude is allowed, because after all it comes to a question upon evidence, what legal consideration there is either to support or raise the assumpsit. Fully, in debt.
Assumpsit.

426. The case was on conusance in replevin under a by-law which imposed a punishment on doing an act contrary to that, and all former by-laws. — The former by-laws must be shown; for how can the Court judge whether the offence were against by-laws not set forth? besides they may contain some exception, or may not be in themselves legal. Replevin.

427. A by-law may be set forth and pleaded with an averment, that it is no longer extant: in this case continued usage in conformity with it must be shown, commencing about the time at which it is averred to have been made. Not extant.

428. The plaintiff must not only show the power of making the by-law, and that it was made and imposed Penalty to plaintiff.

(425) *Feltmakers v. Davis*, 1 B. P. 102. *Barber Surgeons v. Pelson*, 2 Lev. 252.

(426) *Gerrish v. Rodman*, 3 Wils. 171.

(427) *Case of Corporations*, 4 Co. 78. *R. v. Tomlyn*, C. T. H. 316. *R. v. Westwood*, 4 B. C. 786.

(428) *Exon v. Starre*, 2 Show. 159.

the penalty, but that it was payable to, and recoverable by him.

Defendant
within by-
law.

422. It must appear on the proceedings that the defendant is under the legal influence of the by-law, and within its obligation. Therefore where the by-law binds freemen only, it must be averred that the defendant is a freeman, and the same where it binds inhabitants. But an averment that he had taken a house and put in a journeyman is sufficient. If it be shown that he was once within the obligation of the by-law, it is not necessary to aver formally and particularly that he is so at the time of the offence committed. Therefore, if it appear that he became a freeman, or came to reside on the first of January, and that the offence was committed on the first of the following April, it is not necessary to aver that he continued a freeman or to reside up to and on that day; for unless the contrary appear, that shall be presumed.

Not within
exceptions.

430. If the by-law except certain classes of persons from its operation, and the exception be material, it is necessary to aver that the defendant is not within it.

Demand
before ac-
tion.

431. If the by-law, after imposing the penalty, go on to declare that if the offender "deny, refuse or neglect" to pay the penalty, it shall be recoverable in an action of debt; it is not necessary to aver a demand before commencing the action; for had nothing been said, no demand is necessary, and these words do not make it so,

(429) *Colchester v. Goodwin*, Carter, 119. *Gunmakers v. Fell*, Willes, 390. *Ex-parte Eden*, 2 M. S. 229.

(430) *R. v. Abingdon*, 1 Salk. 432. *R. v. Coopers of Newcastle*, 7 T. R. 547.

(431) *Butchers v. Bullock*, 3 B. P. 434. 437.

but had the word "neglect" been omitted, perhaps it might have been presumed that an indulgence was intended, and a demand made necessary before an action would lie.

432. If the penalty be for refusing to accept an office which is not legally noticed as being of the constitution of the Corporation, it must be averred that the Corporation has such office. Therefore if it be for refusing the livery of a company, the proceedings must show that the company has a right to have, and has such office. And this is not mere matter of form, but substantial, and may be traversed and put in issue, or objected to on a general demurrer. But such office being shown to exist, the Court will notice its nature, and the liability of all freemen to serve until the contrary is shown. Refusal of office.

433. If there be a company having a livery, and having freemen who may be free of the company, though not free of the Corporation, and a by-law is made imposing a penalty for refusing the livery, it is necessary to aver, not only that the defendant is a freeman of the company, but also that he is a freeman of the municipal Corporation; for otherwise he is not subject to the by-law.—This case is very briefly reported, it appears that the by-law was made by the company, in which case it is equally obligatory upon all the freemen, whether members of the municipal corporation or not.—The observation of the judges seems applicable only where the by-law is made by the municipal corporation. Who liable.

(432) *Innholders v. Gledhill, Sayer, 275.* R. v. Clerk, 1 Salk. 349.

(433) *Innholders v. Gledhill, Sayer, 275.*

Notice of
election and
Courts.

434. In an action to recover the penalty for refusing office, it is not necessary to aver that the defendant had notice of his election, for every corporator is presumed to know what is done at the Corporation Courts where he should be attendant, and for the same reason it is not necessary to aver when a Court was held or where, unless it was upon an extraordinary occasion, or at an unusual place, for he is also presumed to know where and when the usual and periodical courts are held.

On custom
against fo-
reigners.

435. When the action is on a by-law founded on a custom excluding foreigners from trade, it must appear that the act of the defendant was done in the way of his public trade, and not for his private and domestic purposes; but this is sufficiently shown by an allegation that he "used the manual occupation of a tallow-chandler."

Notice of
by-law.

436. It is not necessary to aver that the defendant had notice of the by-law; for all within its obligation are presumed to be conversant of the laws to which they are subject, although strangers to the freedom of the place.

Duty of
plaintiff
discharged.

437. In an action for the penalty of the by-law prohibiting all persons to interfere in the portorage of corn, except those who are members of the company of free porters, it is necessary to aver that there was a free porter present at the time, who might have been employed.

(434) *London v. Vanacre*, 5 Mod. 442. S. C. 1 Ld. Ray. 500. *Vintners v. Passey*, 1 Bur. 239.

(435) *City of London's Case*, 8 Co. 129. a.

(436) *London v. Bernardiston*, 1 Lev. 16. *James v. Tutney*, Cro. Car. 498.

(437) *Fazakerley v. Wiltshire*, 1 Str. 468.

438. In action of debt upon a by-law of a municipal Corporation, the defendant cannot wage his law, because the action arises out of a public act in the nature of a specialty, and it seems that wager of law will not be allowed where the by-law is made by a company. If the defendant plead the general issue, and, instead of putting himself on the country, wage his law upon disallowance of the conclusion of the plea, there must be final judgment, and not a respondeas ouster, for the commencement of it is in bar.

Defence—
no wager
of law.

439. To an action for recovery of a penalty for refusing office, the defendant may plead in bar any reasonable excuse; such as his inability, which exempts him from service; or that his election will be attended with inconvenience to the Corporation. Or he may plead the general issue nil debet, and give such excuse in evidence.

Insuffici-
ency to serve
office.

440. He may plead that he is not eligible by reason of not having received the sacrament under the regulations of the statute of Car. II., and that he is a protestant dissenter, and has complied with the provisions of the statute of 1 W. & M. c. 18. But this latter statute being a private act, must be pleaded specially, and if he omit to set it forth in his plea, but introduce it in the rejoinder, it seems to be a departure. How far dissenters might avail themselves of the benefit of this act as an exemption from serving corporate offices, was for a long time a litigated question. But upon review of the cases, it appears that little doubt was entertained in the supe-

Ineligibili-
ty.

(438) *City of London v. Wood*, 12 Mod. 669. 675. 677. 684.

(439) *London v. Vanacre*, 1 Ld. Ray. 499. S. C. Carth. 483. *Vintners v. Passey*, 1 Bur. 239. *R. v. Leyland*, 3 M. S. 188.

(440) *Guilford v. Clarke*, 2 Vent. 248. *R. v. Larwood*, 1 Ld. Ray. 32. S. C. Skin. 575. *Harrison v. Evans*, 6 Bro. P. C. 196. S. C. Cowp. 323. *nota*.

rior courts, although many had been grievously vexed in the city of London. For in Westminster Hall the cases had been sometimes determined upon the pleadings; in other cases the statute had been held to be a protection, and it was the opinion of several judges, that the statute of Charles was intended as an exclusion of such persons from office, and therefore, a protection against the penalties of refusal. But all doubt has been set at rest by the decision of the case of *Harrison v. Evans* in the House of Lords.

Lost by-
law proved.

441. Where a by-law is pleaded to have been made and lost, from ancient usage in conformity with it a jury may find the fact of its having been made in the terms set forth, and since lost, whether the Corporation be by prescription or charter, particularly if the usage be traced to a period when an alteration was suddenly introduced; but it ought to have been of long continuance and without variation. If it be found only that such an usage has prevailed from any period within time of memory, without finding a by-law, the alteration cannot be sustained whether the Corporation be ancient or modern; for in an ancient Corporation the usage within time of memory may be evidence of a custom, yet if a period be shown at which the contrary prevailed, that evidence is rebutted, and in a modern Corporation there can be no usage inconsistent with the charter.

442. It was held that there could be no sufficient usage to warrant a presumption of a by-law lost, where a different form of election had been prescribed by a charter about seventy years before.

(441) V. tit. 255. Case of Corporations, 4 Co. 78. R. v. Tomlyn, C. T. H. 316. R. v. Westwood, 4 B. C. 786. R. v. Miller, 6 T. R. 280.

(442) R. v. Grosvenor, 7 Mod. 198.

OTHER METHODS OF ENFORCING BY-LAWS.

443. A by-law may render the penalty recoverable by Distress.
 “distress” and detention, until payment according to
 the forms of common law.

444. It was held, that when a by-law gives power to When.
 distrain upon due proof before the master and wardens,
 there can be no distress before a verdict for the penalty;
 for there is no legal proof other than the finding of a
 jury.

445. A by-law cannot give a power of “distress Distress
 and sale;” for that is contrary to common law, and and sale.
 can be given only by the legislature, unless there
 be a special custom. And if a by-law affect to give
 this power it is void, as well for the distress as the sale,
 and he who levies it, is a trespasser ab initio. I presume
 that this method of distress was intended by Lord El-
 lenborough, when he said, in *Adley v. Reeves*, that “a
 by-law giving a remedy by distress for the recovery of
 the penalty would be bad.”

446. It seems that without special custom a by-law Detainer of
 cannot empower an officer to detain the offender’s share profits.
 of the profits of the company, until the amount shall

(443) *Clerke v. Tucker*, 3 Lev. 281. S. C. 2 Vent. 183. 1 Wils. 237.
Clark’s Case, 5 Co. 64. a. *City of London’s Case*, 8 Co. 127. b. *Lee v.*
Wallis, Sayer, 263. 1 Kenyon Ca. 295. *City of London v. Wood*, 12 Mod.
 686.

(444) *Wood v. Searle, Bridg.* 142.

(445) *Clerke v. Tucker*, 3 Lev. 281. S. C. 2 Vent. 183. *Lee v. Wallis*,
 1 Kenyon Ca. 295. S. C. *Sayer*, 263. *Adley v. Reeves*, 2 M. S. 60.

(446) *Adley v. Reeves*, 2 M. S. 60.

be sufficient to liquidate the penalty incurred by his breach of the ordinance.

Forfeiture
of profits.

447. A by-law cannot compel payment of the penalty by declaring that the offender shall be excluded from all participation in the profits of the company, until he shall come and pay the penalty, or that a stop shall be made of his gun-proof, which would prevent his carrying on his trade with equal advantage.

Imprison-
ment for
penalty.

448. Nor can it compel payment by declaring that the offender, though a freeman who has assented to such by-law, shall be committed to prison until he shall pay the penalty, unless there be a special custom or a power granted by statute.

When re-
strained by
charter.

449. When a Corporation is empowered to enforce their by-laws, by fine or amerciamment, they are by implication precluded from adopting any other method of punishing disobedience to them.

Forfeiture
of goods.

450. A by-law cannot ordain that the goods which are the subject of the offence, shall be forfeited except there be a special custom or express power given by a statute.

Fine for
non-per-
formance. §

451. Nor can a Corporation set a fine for the non-performance of a by-law.

(447) *Adley v. Reeves*, 2 M. S. 60. *Gunmakers v. Fell*, Willes, 390.

(448) *Wood v. Searle*, Bridg. 141. *Clarke's Case*, 5 Co. 64. a. *City of London's Case*, 8 Co. 127. a. *Bab v. Clerke*, Moore, 411. *R. v. Clerk*, 1 Salk. 349. *R. v. Boston*, Jon. 162. *R. v. Merchant Tailors*, and *R. v. City of London*, 2 Lev. 200. *London v. Wood*, 12 Mod. 686. S. C. 1 Salk. 397. 1 Rol. Abr. 363. 1. 45. 364, 365.

(449) *Kirk v. Nowill*, 1 T. R. 125.

(450) *Player v. Archer*, 2 Sid. 121. *Kirk v. Nowill*, 1 T. K. 124. *Clark v. Tucker*, 2 Vent. 183.

(451) *R. v. Newdigate*, Comb. 10.

452. Nor can it ordain that the offender shall be imprisoned for a specified period, nor that he shall be imprisoned unless he pay the penalty. Nor that he shall be so imprisoned during the mayor's pleasure, particularly for speaking opprobrious words of him; and the circumstance that a by-law is made by general assent avails nothing.

Imprisonment.

453. Nor that the act prohibited, being warranted by common law or the original constitution of the charter, shall be void.

Avoidance of act.

454. Nor that the offender shall be disfranchised.

Disfranchisement.

455. If under pretence of a void by-law the person or property of the offender be illegally taken, an action of trespass may be maintained against the officer. And if such officer justify under the Corporation, relying on the validity of the custom or by-law under which he has acted, he must show the authority by which the court exists, whether by prescription or charter, with all things necessary to be pleaded in an action upon such custom or by-law. And in justifying a distress, although he is general bailiff to the Corporation, he must show a special precept under the common seal; for this is not an act which he is empowered to do in virtue of his office, and in this respect the case differs from consuance made by a bailiff in replevin.

(452) *Clark's Case*, 5 Co. 64. *Bab v. Clerk*, Moore, 411. *London v. Wood*, 12 Mod. 686. 3 Salk. 76. p. 6.

(453) *Harscot's Case*, Comb. 203. *Doggerill v. Pokes*, Moore, 411.

(454) *R. v. London*, 2 Lev. 201. *Clarke's Case*, 1 Vent. 327. *Bab v. Clerk*, Moore, 412. contra.

(455) *Strode v. Deering* Show. 168. *Lamb v. Mills*, Skin. 587. *Wood v. Searl*, Bridg. 139.

CHAPTER III.

ELECTION, &c.

THIS chapter treats of the means by which Corporations are preserved in their vigor, and supplied with a perpetual succession of members and officers, and is divided into the following sections :

- I. The inchoate right of admission to Corporate freedom.
- II. Who are eligible as freemen or officers,
- III. In whom the right of electing is vested.
- IV. Essentials of a valid election.
- V. Admission.
- VI. Refusal of office.
- VII. Appointment of ministerial officers.

SECTION I.

THE INCHOATE RIGHT OF ADMISSION TO CORPORATE FREEDOM.

456. According to the principles upon which municipal Corporations were first established, it might appear that there was an incidental right to the freedom vested in all persons after they had become inhabitants

(456) *R. v. Hereford*, 11 Mod. 189. et notâ. *Wilkins' Leges Anglo-Saxonicae*, Ll. Guil. Conq. p. 229. s. 66. *R. v. West Looe*, 5 D. R. 598. S. C. 3 B. C. 686. *Merew. West Looe Case*, 230.

of the place incorporated, within the rules of the ancient law; that is, after they had been resident householders paying scot and lot for a year and a day. There would seem to be another reason for their possessing that right, which is, that the principles of our constitution do not consider any man bound by laws to which he has not assented either in person, or by the voice of his representatives; and at the same time it is settled, that all the inhabitants of the municipality are bound by such by-laws, as are made by the Corporation for the government of the place. The principle of assent through the medium of representatives is, in most cases, rather a legal presumption than the fact; and perhaps the presumption may be extended a little further, and the inhabitants of a municipality be presumed to assent, by representatives whom they never elected, to the ordinances of the corporate body. As to the assent inferred from coming to live in a place, that is applicable to but a proportionably small number of the people; for the greater part are generally natives, in whom no such consent can be implied with any greater plausibility, than that of the Athenians to the edicts of a Sultan by happening to be born within the jurisdiction of the Ottoman Porte. However, we find no such inchoate right recognized by the courts. Even where the charter seemed to imply such a right, it was held to be a mere qualification, and to confer no title to be admitted. It may be proposed that all inchoate rights are derived either from prescription or grant.

457. The charter may confer an inchoate right of admission upon all the inhabitants, or upon certain classes of them, but such a right is not given by an

Inhabit-
ants.

(457) *R. v. West Looe*, 3 B. C. 686. S. C. 5 D. R. 598. *R. v. Hereford*, 11 Mod. 188.

incorporation of the burgesses or inhabitants of the place in general terms, nor by a grant that it shall be a borough "of mayor and burgesses being inhabitants of the town." In this case inhabitancy is a mere qualification.

Inherit-
ance.

458. Sometimes this right is conferred on the sons of freemen generally, or on those who have served an apprenticeship within the place, or are distinguished by some other qualification.

Appren-
ticeship.

459. If conferred on those who have served an apprenticeship with a resident freeman, it must have been served in the place; and it is not sufficient that the master occasionally resides, and that the indentures were made within the municipality.

460. Although an apprenticeship to a freeman of a town, should be for seven years, yet an indenture for four years is voidable only, and not absolutely void; and if the service have been completed under it, a settlement is gained, and it may be inferred a right of admission to the freedom.

461. If the right be conferred on those who have served an apprenticeship, it is not forfeited by an apprentice having absented himself from his master's service, although the indentures were rendered voidable, on account of such absence.

(458) *R. v. Bird*, 13 East, 389. *City of London's Case*, 8 Co. 126. b. *R. v. West Loce*, 3 B. C. 684. *Austin v. Osborn*, Comyns, 240.

(459) *R. v. Marshall*, 2 T. R. 3. *R. v. Cambridge*, 2 Chit. R. 144.

(460) *R. v. St. Nicholas in Ipswich*, Bur. Set. Ca. 91. S. C. 2 Str. 1066. S. C. C. T. H. 323.

(461) *Gray v. Cookson*, 16 East, 27. *Smedley v. Gooden*, 3 M. S. 190.

462. The person was bound apprentice to a freeman for seven years. About a year and a half before his time expired, he went to serve it out with a stranger under this indorsement. "I, A. (the freeman) let B. (the apprentice) to C. (the stranger) for the residue of his time, to find him of all necessary things during his time, and at the end his comings;" signed by A. and C. The question was, whether this service entitled to the freedom as service to a freeman: the Court declared it a question for the jury, and refused their opinion.

463. If the apprentice have broken a covenant contained in the indenture, as, if he have married during the term, contrary to his covenant, the master may maintain an action on the breach against him, but it is no forfeiture of his right, to be admitted to the freedom.

464. Nor although he have ceased to reside with his master, which was at first the case, having married and continued to work with his master, more as a journeyman than an apprentice.

465. If a by-law introduce a provision, that the apprentice shall not be entitled to the freedom of the place, unless his indentures be enrolled with the town clerk within a reasonable time after they are executed, such as four months, the inchoate right is restricted, and those who neglect the precaution, are not entitled

(462) *R. v. Rowe*, 4 Bur. 2289.

(463) *Townsend's Case*, 1 Lev. 91. S. C. T. Ray. 92.

(464) *Id. ibid.*

(465) *R. v. Marshall*, 2 T. R. 3. *R. v. Coopers of Newcastle*, 7 T. R.

547. *R. v. Tappenden*, 3 East, 191. *R. v. Cambridge*, 2 Chit. R. 144.

to a mandamus' to be admitted. But if the indentures have been tendered for enrollment and refused, a mandamus may be obtained to compel the officer to do his duty. This will be more fully treated under the title mandamus.

If the town clerk have made a note of the enrollment upon the indenture, the provision of the ordinance is complied with, and the apprentice entitled to be admitted, although in fact it never were enrolled.

Cannot be
restrained
by by-law.

466. A by-law cannot be made to prevent persons from acquiring this inchoate right, or to add a qualification beyond that required by the constitution.

Or conferred
on
others.

467. If a by-law empower the bailiffs to hold a quarterly court, and declare that at every such court "it shall be lawful" for them to admit to the freedom of the town such persons as should be suitors for the same, and withal should be thought honest and well-disposed men, and being such as had been resident and dwelling within the town for the space of one year; inhabitants so qualified do not derive a right to be admitted, so as to obtain a mandamus, but it is left to the discretion of the bailiffs to admit those whom they approve.

468. And this is not aided by the circumstance that the applicant to be admitted has been frequently fined for carrying on his trade in the borough on account of not being a freeman.

469. The notice of the Court appears not to have been attracted to the validity of the by-law; but I ap-

(466) *R. v. Tappenden*, 3 East, 190. V. tit. 315.

(467) *R. v. Bailiffs of Eye*, 4 B. A. 272.

(468) *Id.* 1 B. C. 86.

(469) V. tit. 254 et seq.

prehend that it is absolutely void, for the charter not having disposed of the power of introducing new members into the body, they can only be introduced by election, which must be by the whole body, in exercise of their incidental power; and this cannot be delegated by a by-law to the head officers of the Corporation alone: on which account an inhabitant so admitted, has but a slender title to his freedom.

470. Nor is any right to be admitted, conferred on persons who have been examined and approved by a select body appointed for that purpose, by the corporate classes, in whom the right of election is vested; the approbation of such body being merely for the information of the elective body, who may either choose or reject the candidate after such approval.

471. A Corporation cannot make a by-law that any person shall be admitted by their officers to the freedom, on paying a certain sum of money; for that were a sale of the franchise; but there may be a custom to admit persons to the freedom, on payment of a certain sum of money, called a right by redemption.

(470) *Dr. Askew's Case*, 4 Bur. 2191.

(471) *R. v. Breton*, 4 Bur. 2260. *R. v. Bird*, 13 East, 384. *City of London's Case*, 8 Co. 126. b.

SECTION II.

WHO ARE ELIGIBLE AS FREEMEN OR OFFICERS.

I. AS FREEMEN.

Incidental
right.

472. It might have been considered that a Corporation has a right only to admit to the freedom the inhabitants of the place, for whose benefit alone it can be supposed that such an institution was intended; being an establishment for the benefit and good government of the place, and the regulation and protection of its trade. In the anonymous case, in *Barnardiston*, Mr. Wills, of counsel, asserted it to be the doctrine of law, that no Corporation could make men honorary freemen, such as non-residents, unless specially empowered by prescription or charter. But in that case, and several subsequent, it has been held, that exactly the contrary is the law, and that every Corporation has an incidental right of electing whomsoever they please, whether residents or non-residents to be freemen, unless restrained by a contrary prescription or provision of the charter; much more may the charter empower them to do so, as by authorising them to make omnes homines quoscunque free of the borough. But where a custom was alleged, that an apprentice was not entitled to his freedom by learning his trade there, but that the Corporation might make whom they pleased free, though Holt C. J. recognized its validity, he observed that it was an extraordinary custom.

(472) Anonymous, 1 Barnard. 137, 138. R. v. Bird, 13 East, 389. R. v. West Looe, 3 B. C. 686. S. C. 5 D. R. 601. R. v. Hereford, 11 Mod. 188. Dartmouth, 12 Mod. 336.

473. This right may, however, be taken away by the express provision of the charter, or perhaps by necessary implication ; as if it point out a certain and constant source from which a sufficient supply of freemen may be at all times obtained.

Taken
away.

474. This is done by expressly requiring a particular qualification in those who are to be adopted as freemen, whether known by the name of burgesses or otherwise, forming the lowest class of the body politic, out of whom alone the officers may be elected ; as when the charter declares that A. shall be a borough of a mayor and burgesses "being inhabitants of the town," in which case non-residents are not admissible to the freedom.

By express
provision.

475. Sometimes the charter renders those alone admissible, who are qualified in a certain manner, as by having an estate of freehold for the term of their lives, within the municipality, whether by purchase descent or marriage, in which case no others can be admitted, not even one who has an estate of freehold within the municipality for the life of his wife; for that may determine in his life-time, so that his estate for life, is conditional only ; but if the wife were tenant in fee, and the husband became tenant for life by the curtesy, this is a sufficient qualification.

476. I am not aware of any case, where the implication has been considered sufficiently strong to exclude

By implica-
tion.

(473) *R. v. Bird*, 13 East, 378. 389. *R. v. West Looe*, 3 B. C. 685. S. C. 5 D. R. 601.

(474) *R. v. West Looe*, 3 B. C. 686. S. C. 5 D. R. 598.

(475) *R. v. Powell*, 8 T. R. 642.

(476) *Anonymous*, 1 Barnard. 137, 138.

this right of general admission. It was not held an exclusion of non-residents, where the charter incorporated "*cives residentes et inhabitantes*"; for that, it was said, was the usual form of incorporations. Yet these words very strongly demonstrate the principle of such establishments, as being confined to the municipality; and in this case a flagrant violation of that principle appeared, for there had been one hundred and nineteen honorary freemen elected at once, undoubtedly for the purpose of out-voting the local party at a parliamentary election: and though the Court said, that it was an improvident exercise of the power, yet as it was not considered illegal, a thousand might have been admitted with equal impunity, if necessary to effect the object of those in whom the power of admission was misplaced.

477. In a recent case it was held that the incidental right of introducing members from any source was not taken away by implication in the charter conferring an inchoate right of admission on sons of freemen who had served an apprenticeship, as well as on others who had served their apprenticeship within the municipality. For it was held, that the incidental power might be exercised consistently with these rights, for the latter alone did not offer a certain and constant source for the supply of freemen.

Consent of
him elected.

478. No one is liable to be made a member of a Corporation without his own consent.

(477) *R. v. Bird*, 13 East, 389.

(478) *Dr. Askew's Case*, 4 Bur. 2200.

479. The statute of Charles II. requiring the sacrament to be taken by those who shall be placed or chosen into corporate offices, does not extend to mere freemen, although they have a vote in the election of members of parliament and right of common; neither are they affected by the exceptions in subsequent acts of parliament excluding those who do not receive the sacrament from places of profit in the government; therefore quakers are admissible to the freedom on their solemn affirmation.

II. AS OFFICERS.

480. As to mere ministerial officers, they will be spoken of in another place. None are eligible to corporate offices, except those already free of the Corporation; where the custom or charter imposes no further qualification, every freeman is equally eligible to any corporate office which he is capable of executing; neither can he be deprived of this right, nor can he refuse to serve when appointed by the majority. Freemen only.

481. Sometimes the constitution requires residence in the freemen to render them eligible to offices, although non-residents may enjoy the freedom; but where it is required as a precedent qualification, it is not impliedly necessary that the officer continue to reside during the Resident.

(479) V. tit. 507. 7 & 8 W. 3. c. 34. 1 Geo. I. st. 2. c. 6. 1 Geo. I. st. 2. c. 13. s. 4. 8 Geo. 1. c. 6. 12 Geo. II. c. 13. 22 Geo. II. c. 46. s. 36. 12 Geo. III. c. 21. R. v. Maurice, Carth. 448. S. C. 1 Ld. Ray. 337. R. v. Lincoln, 5 Mod. 403. S. C. 12 Mod. 190. R. v. Turkey Company, 2 Bur. 1000. R. v. Bosworth, 2 Str. 828. 1112.

(480) R. v. Amery, 1 T. R. 581. R. v. Pasmore, 3 T. R. 208. Dr. Askew's Case, 4 Bur. 2200. R. v. Heath, 1 Barnard. 417.

(477) R. v. Monday, Cowp. 539.

possession of his place ; so where residence is requisite as a qualification during office, it is not by implication necessary that the person elected should have been resident at the time of election.

482. If the charter direct that the common-councilmen shall be elected out of the more discreet "citizens and inhabitants of the city," no one is eligible to be a common-council-man unless both a citizen and inhabitant; although under the charter there may be and are freemen who are not inhabitants, and there is a provision in it "that any freeman refusing to execute *any* of the offices of the city shall be grievously punished;" for if there are other offices to which freemen, although non-resident may be elected, the penal clause shall be construed distributively, and the differently qualified freemen are respectively liable to punishment for refusing those offices alone to which they are eligible, and, therefore, derive no new qualification from the terms in which the punishment is denounced.

What sufficient residence.

483. As to what is a sufficient inhabitancy, the question has not often come before the Court in quo warranto, but a very transitory residence has been held sufficient.

484. A corporator, who had formerly resided in the borough and been desirous of taking a house there, a short time before the day of election bargained to rent one for four years, but at the desire of the owner subsequently engaged it for one year only: before the election he had slept in it one night, after the election in the course of the first six weeks he had slept in it two nights ;

(482) R. v. Heath, 1 Barnard. 417.

(484) R. v. Sargeant, 5 T. R. 467.

at the expiration of that time on an application for an information in the nature of *quo warranto* against him, he asserted in his affidavits that it was his intention to reside at this house as often as his connexions with the borough should call him there.—This was considered a *bonâ fide* inhabitancy.

485. It was held sufficient, where the house was taken and occupied on the day before the election, and for the purpose of qualifying.

486. But in a recent case it was held that taking part of a house for the purpose of such qualification, a few days before the election (although there was a treaty for purchase of a house there, which had been completed since the election) and residence for two days on his visiting the neighbourhood in a military capacity, was not such conclusive evidence, but that an information ought to be granted that it might go to a jury.

487. Where the requisite qualification was inhabitancy in the borough of N. during the preceding six months, a person was considered to have been qualified who became a substitute in the militia, and leaving his wife and family in possession of the house, resided during that period at his quarters with the regiment in another town, except for a day or two on the eve of an election which he had spent with his wife in the borough, he having been constantly responsible for the rent and taxes of the house.

(485) *R. v. Scolden*, 2 Barnard. 440.

(486) *R. v. Duke of Richmond*, 7 T. R. 560.

487) *R. v. Mitchell*, 10 East, 518.

488. When inhabitancy is the requisite qualification, it does not merely imply residence, but keeping a house within the place, and paying scot and lot.

Inhabitan-
cy in several
places.

489. One was held to be such an inhabitant who had served the office of church-warden, and occupied a house in the borough, for which he paid the rates and taxes, although he retained but a part in his own hands, having let the remainder in lodgings and resided the greater part of the year in another town; for a man may be an inhabitant householder in several places at the same time.

Qualifica-
tion by of-
fice.

490. The charter frequently confines the election of particular officers to be out of a particular class, in which case no others are eligible: difficulty has sometimes arisen upon this point as to the construction of the charter.

Disqualifi-
cation by
office.

491. The charter appointed that one of the burgesses should be mayor; that two others should be bailiffs; that divers of the burgesses should be aldermen; that the mayor after the due execution of his office, should become an alderman; that if there were not eight aldermen remaining on the day appointed for electing a mayor, so many burgesses should be then appointed as would complete that number; and that then the mayor and aldermen should nominate four burgesses inhabitants, of whom the burgesses at large should elect one to be mayor. — The aldermen continue burgesses, but they are by implication excluded from being put in nomination as candidates for the office of mayor, the intention

(488) *R. v. Mallet*, 2 Barnard. 408. N. P.

(489) *R. v. Scolden*, 2 Barnard. 439.

(491) *R. v. Weymouth*, 7 Mod. 374. S. C. 4 Bro. P. C. 464.

of the charter is, that the select classes should be supplied from the mere burgesses.

492. But if a charter provide that the mayor shall be elected out of the aldermen, and a void surrender having been made, and a new charter (on that account void) subsequently granted and acted upon, and A. having been elected an alderman, and having acted as such under the void charter, and so continued after the corporation had recurred to their ancient valid charter, be then elected mayor; this election appears to be good, for having the actual possession of the aldermanship, he shall be intended to be a rightful officer until the contrary appears, as if *merè laicus* be presented, &c. to a benefice, he shall be taken to be a clerk until first steps are annulled. It was said in a subsequent case that if one be irregularly chosen at first, and afterwards owned by the town; and entered in the town book, or regularly chosen into a superior dignity; what followed should be taken to be such evidence of a good election as ought not to be controverted. Per Holt, C. J.

Qualifica-
tion by ac-
quiescence.

493. For the law on this subject, see post, 32 Geo. III. and title *Quo Warranto Relator*. The general conclusion to be drawn from the cases on this point is, that none of those who have acquiesced in the subsequent election will be permitted to dispute the validity of the former; but if six years have not expired from the time of first holding the former office, any person who is not concluded by his assent, or otherwise improper to be a relator, may question it in *quo warranto*, either to oust the usurper from the original office, or the second, which is founded upon it.

(492) *Piper v. Dennis*, 12 Mod. 253. *Lord v. Francis*, 12 Mod. 408.

Disqualifi-
cation by
inconsistent
office.

494. By the regulations of some charters, certain officers are, during one office, or at the moment of its termination, excluded from being eligible into another, on account of some inconsistency.

495. The charter declared that the mayor, bailiffs and burgesses, should choose one of themselves to be mayor, and two of themselves to be bailiffs; and that the person elected mayor before his admission should take the oaths before the last mayor, his predecessor, and the bailiffs for the time being; and that those elected to be bailiffs, before their admission, should take the oaths before the mayor and the last bailiffs. A subsequent charter directed that the mayor should continue in office until a certain day and until some other of the burgesses should be elected mayor; and the bailiffs until a certain day and until two other of the burgesses should be elected bailiffs. It was held, that upon the fair construction of these provisions neither the mayor could be elected bailiff before a new mayor had been elected, for in that case he would be sworn before *himself* and the former bailiffs; nor a bailiff elected mayor before the new bailiffs had been elected, for then he would be sworn before the mayor, the other bailiff, and *himself*: but that it was otherwise immaterial whether the mayor or the bailiffs were elected first.

496. By the operation of the statute 11 Geo. III. the presiding officer at an election under it is excluded from being elected mayor or head officer, though formerly eligible; for a swearing in before himself would be inconsistent with all principle, and a swearing in before any other persons would be contrary to the express provisions of the statute.

(495) R. v. Harper, 5 East, 219.

(496) R. v. C. Malden, 4 Bur. 2132. R. v. Nance, 7 Mod. 340. V. tit. 511.

497. "In divers counties, boroughs, towns corporate and cinque ports, where the mayor, bailiff or other officer or officers to whom it belongs to preside at the election and make return of any member to serve in parliament, ought to be annually elected, no person or persons who hath been or shall be such annual officer for one whole year shall be capable to be chosen into the same office for the year immediately ensuing."

Last mayor,
&c.
repealed
30th Dec

498. This statute does not extend to any head officers who are not the returning officers of members to parliament.

499. In a prescriptive corporation there may be a custom that a person who has served an office for two years in succession, cannot be again elected for the subsequent year.

500. The statute 1 Richard II. c. 11. which ordains "that none that hath been sheriff of any county by one whole year shall be within three years next ensuing elected again," does not extend to exclude the sheriffs of cities or boroughs from being re-elected within that time, although they are counties of themselves.

501. By this statute mayors, bailiffs, &c. are rendered ineligible in future, if they attend any place of public worship other than the Church of England with the habit or insignia of their office.

(497) 9 An. c. 20. s. 8.

(498) R. v. Scott, 1 Barnard. 24. V. tit. 113.

(499) R. v. London, 1 T. R. 426.

(500) R. v. Haythorne, 5 B. C. 429. n.

(501) 5 Geo. 1. c. 4. s. 2. V. tit. Officer.

Disqualifi-
cation by
business.

502. By the operation of the statute, 39 Geo. III. c. 76. s. 3. upon the 26 Geo. III. c. 13. s. 12. a dealer in spirits, &c. is not disqualified from being elected mayor, although the charter makes the granting of spirit licences a material part of his duty; because the more recent statute empowers him to apply to a magistrate of the county to grant them if there be not sufficient magistrates in the municipality.

Disqualifi-
cation by
present in-
capacity.

503. No one is eligible to an office in a Corporation who is not legally capable of entering upon and executing the business of it at the time of his election. Therefore the election of one gone to America into the office of mayor, is absolutely void and a mere nullity; for it is no way probable that he will be able to undertake the office in proper time; and there is so plain a fraud, that a mandamus will be granted for a new election, as though the office were vacant, without putting the party to the necessity of ousting the person so elected by quo warranto.

Infancy.

504. An infant cannot be elected to an office of a financial nature, because he is not legally responsible for the trust confided to him; and it makes no difference that such an officer may appoint a deputy, because the principal ought to be equally responsible for the acts of his deputy as for his own.

505. An infant of six years old cannot be elected mayor, nor it seems even a burgess, although the admission be not to take place until his arriving at manhood.

(502) R. v. W. Smith, 2 M. S. 597.

(503) R. v. Courtenay, 9 East, 261. R. v. Cambridge, 4 Bur. 2010.

(504) Claridge v. Evelyn, 5 B. A. 86.

(505) R. v. Courtenay, 9 East, 261. R. v. White, C. T. H. 8. R. v. Carter, Cowp. 59.

506. "No person or persons shall be placed, elected, Sacrament.
or chosen, in or to any of the offices of mayor, aldermen, recorders, bailiffs, town-clerks, common-councilmen, or other offices of magistracy, or place or trust, or other employment relating to or concerning the government of any city, corporation, borough, cinque port, or any of their members, or other port-town, within England, Wales, and Berwick upon Tweed, that shall not have within one year next, before such election or choice taken the Sacrament of the Lord's Supper, according to the rites of the church of England."

507. It has been said that this statute does not extend to common freemen; but common-council-men, are included, for they hold an office, whereas a mere freeman has a franchise only.

508. The statute of 5 Geo. 1. does not extend to render those who have neglected to receive the sacrament according to the 13 Car. II. eligible to the offices within its provisions; and therefore an election contrary to it, does not confer any title upon the unqualified candidate, so as to give him a right to apply for a mandamus to be admitted. Nor, it seems, can such a title be acquired by receiving the sacrament after the election, within the conditions of the annual indemnity act, although no other person has been admitted in the mean while; for the terms of that act confine the privilege to persons receiving the sacrament after being in possession of the office.

(506) 13 Car. 2. st. 2. c. 1. s. 12.

(507) *R. v. Love*, 12 Mod. 601.

(508) 5 Geo. 1. c. 6. s. 3. 7 Geo. 4. c. 3. s. 1. *R. v. Monday*, Cowp. 539.
R. v. Hawkins, 10 East, 216. *R. v. Parry*, 14 East, 561.

Wilful incapacity a refusal of office.

509. It has been held, that a neglect to receive the sacrament, within the terms of 13 Car. II. being termed a voluntary disqualification, subjects a corporator to the punishment imposed on a refusal to accept office.

Qualification of nominees.

510. If the form of election be, that a certain number of persons qualified in a particular manner, shall be nominated by one body of the Corporation, of whom one shall be elected by another body, each of the nominees must be qualified in every respect; for the second body of electors have a right to choose from the appointed number of persons duly qualified, otherwise the election might be virtually effected by the body which nominates, by their nominating only one proper person, which would render it necessary to elect him. And if all the nominees are not capable of being elected, the election of any one of them is void, on account of the inequality of his colleagues, although he is himself qualified in every respect.

511. But where it was appointed that two persons should be nominated, the presiding officer under stat. 11 Geo. 1. was nominated as one of them, being in other respects qualified, the other nominee was elected, and the election held to be legal; because it was said the king might have appointed some one to swear in the president, had he been chosen, although he could not admit himself.

Usurpers may be elected.

512. It is no objection to the validity either of a legal election or admission, or both; that the person elected or admitted was at that time actually exercising

(509) Vide Sec. vi.

(510) *R. v. Peacock*, 4 T. R. 686.

(511) *R. v. Nance*, 7 Mod. 342. V. tit. 496.

(512) V. tit. Quo Warranto, Judgment. *R. v. Taylor*, 2 Barnard. 281.

the office without title, and liable to be ousted in quo warranto as an usurper: nor does a subsequent judgment in quo warranto affect a good title, acquired during the usurpation, but the judgment must be only entered of the fine for the past usurpation, and not of ouster from the office which he then holds.

SECTION III.

IN WHOM THE RIGHT OF ELECTING IS VESTED.

513. The right of electing new members and officers is incidental to every Corporation, and there is no need that it should be conferred by the charter. Therefore where it is not expressly lodged in other hands, it must be exercised by the body at large, on which account, if in pleading one rely upon an election by any select body, it is necessary to show by what authority and in what form such body is constituted, for a general allegation of election, implies an election by the whole body in exercise of their incidental power.

Incidental
to body at
large.

514.* This power of election both of members and officers may, by the charter, be taken from the body at large, and reposed in a select body constituted by the crown. In whatever instances it is so disposed of, the remainder of the Corporation must not join in the election.

Transfer-
red to se-
lect classes,
by charter.

515. It was said by one of the judges, that when the right of election was originally vested in the Corporation at large, it could not be transferred to a select

(513) 1 Rol. Abr. 513. l. 50. Philips v. Bury, Ca. Parl. 45.

(514) Anon. 12 Mod. 225.

(515) R. v. Larwood, Skin. 575. R. v. Wynne, 2 Barnard. 391.

class by a new charter, but denied by Holt, C. J.—There is certainly no good reason for maintaining that it cannot be so altered, unless we maintain that the franchise of being a Corporation cannot be surrendered; but if we support the latter position, we can hardly admit so fundamental an alteration in the constitution of a municipality. This alteration is not to be contended for on the same ground that a by-law altering the manner of election may be supported, that is, common assent; for in the acceptance of the charter, the grantees assent not only for themselves, but their successors also for ever; whereas in making a by-law, the assent binds (or is presumed to bind) only themselves and their successors, *until* the majority choose to change their will and repeal the ordinance. The cases which have been determined on the presumption that the right of election may be restricted by a new charter, are so numerous that the question seems to be no longer controvertible.

By-law.

516. So the exercise of the right of election may be reposed in a select body, constituted by an ordinance, made by the Corporation itself, where the right of making by-laws is vested in the body at large.

Usage.

517. But if the right of election were originally in the body at large, it is not transferred to a select body by the neglect of the commonalty to join in elections for the last thirty-five years, or any other length of time; for it is a franchise which they cannot surrender, by mere neglect of exercising it.

518. No usage adduced in explanation, can sustain a corporate act, done in a manner plainly contrary to

(516) V. tit. 254.

(517) R. v. Grosvenor, 7 Mod. 198. R. v. Wynn, 2 Barnard. 391. R. v. Castle, Andr. 124. R. v. Tucker, 1 Barnard. 27. R. v. Tomlyn, C. T. H. 316.

(518) R. v. Miller, 6 T. R. 280. R. v. Varlo, Cowp. 250.

that prescribed by the charter. But where the words of the charter are doubtful, usage from a remote period is of great authority as explanatory of the intention of the crown; and if it prevailed from a time anterior to the grant, and was not altered in consequence of it, it is fair to assume that the intention of the crown so doubtfully set forth, was that the act should be done in the usual manner.

519. The power of election reposed in a select body Partially. may be of certain officers only; or one class of officers may be made eligible by one select body, and another class by a different. If the charter declare by whom some officers shall be elected, and make no provision for the election of others, these must be chosen by the body at large, of their incidental authority.

520. The charter may assign the power of electing Temporarily. certain officers to a select body, for a limited time only; as if it declare that on a vacancy among the aldermen, the mayor and aldermen may elect another within eight days. In this case, during the first eight days after the death, amotion or resignation of an alderman, the mayor and aldermen form a select body with an exclusive right of electing a successor; but if they allow that time to pass, the election must be afterwards made by the body at large, of their incidental authority; for the provisions of the charter abridge the incidental rights of the body in all the cases where they have expressly altered them, or assigned them to the exercise of another body; but in all cases where not so disposed of, they remain unaffected. The case in Rolle states the Corporation to be constituted of mayor and aldermen only, and that

(520) 1 Rol. Abr. 513. l. 50. R. v. Thetford, 8 East, 271. R. v. Sparrow, 2 Str. 1123.

the election after the eight days was made by virtue of their incidental power.

The Thetford case is very briefly reported. It would seem that the mandamus was issued to the mayor and principal burgesses, omitting the commonalty: if so it is liable to great objection. The extension of the statute of 11 Geo. I. to the election of officers for life, perhaps is not exceptionable, as it is a remedial act, but the objection is on another point. The Corporation consisted of a mayor, ten principal burgesses and twenty of the commonalty, incorporated under the name of mayor burgesses and commonalty. The right of electing, to supply vacancies among the principal burgesses, was given to the mayor and principal burgesses "from time to time, as they should think fit and expedient, within eight days next following" the vacancy. They neglected to elect within eight days after a vacancy, and the application was for a mandamus. If the case in Rolle be recognized as law, and I believe it has never been impeached, the right of the mayor and principal burgesses to elect, had lapsed by their neglect of doing so within eight days, and the right of election reverted to the Corporation of their incidental authority, which must be exercised by the body at large. Therefore the mandamus ought to have issued to them in their corporate name of mayor burgesses and commonalty, and not to the mayor and burgesses alone. Had the incidental right been taken away, and the right of electing limited to be exercised within eight days, the neglect being contrary to the duty of the Corporation, it had been a proper case for the Court to interfere by mandamus, as it does to compel justices of peace to appoint overseers of the poor, when the proper time of doing so has slipped.—But in this case, the interfer-

ence operated to deprive the commonalty of their right to vote in the election, which the Court will not assume to do.

521. If the charter grant to the "mayor and commonalty" that on the vacancy of an alderman, the other "aldermen" shall nominate two "burgesses" (the Corporation consisting of mayor, aldermen and burgesses), of whom the "Commonalty" shall choose one to be an alderman; the word Commonalty equally includes aldermen and burgesses in this case, and the aldermen must join with the burgesses in the election of one of the nominees; for had it been intended to restrain the votes to the burgesses alone, without doubt the word "burgesses" would have been used instead of "commonalty."

Construction of charter.

522. If an act of parliament vest the right of electing certain officers in those only who pay towards the church and poor rates and the rate for the maintenance of orphans, and subsequently the last rate is otherwise satisfied and no longer levied upon the citizens, those who pay towards the subsisting rates are entitled to vote, although not making any compensation for the rate to maintain orphans. And if the act further provide "or pay 30s. a year to some or one of them" after the cessation of the rate for orphans, those who pay all for which they are liable towards the subsisting rates may vote, although their assessment do not amount to 30s. a year.

The qualification may cease to be requisite.

523. If the right of election be reposed in a select class consisting of twelve, and the Corporation have

Color of qualification.

(521) *R. v. Osborne*, 4 East, 336.

(522) *Warden v. Rous*, 7 Mod. 325.

(523) *R. v. Hearle*, Str. 625. S. C. 3 Bro. P. C. 178. Cowp. 507.

undertaken to increase the number, the elections of all persons chosen after the number of twelve is complete, are absolutely void, and a mere nullity; and if such persons give their vote as members of that class, they are to be altogether rejected as illegal, and of no effect.

Who can
vote as
freemen.

524. The question was concerning the right to vote as freemen: the right of election was in the freemen at large, and a Court was held for electing another mayor; the preliminary business was the admission of freemen. The mayor admitted one freeman, and then gave notice for the election of a mayor; six others put in their claims to be admitted by right of apprenticeship and inheritance, and tendered the usual fine; but the mayor refused to transact any other business, and did not admit them before the election of the new mayor. At this election twenty-four persons who had been duly admitted to the freedom voted for A., and twenty such freemen, together with the six claimants, making in the aggregate a majority, voted for B. Upon a feigned issue, it was afterwards found, that the six claimants had a legal title to be admitted—Three judges against Eyre J. held that the votes of the claimants to be admitted were legal, and that B. was duly elected.

But that of Eyre J. is the better opinion; for if the person entitled to his freedom may on application to be admitted and refusal participate in all franchises as a freeman, there is no necessity for applying to the Court for a mandamus to be admitted. The election might have been considered altogether void, and a mandamus issued to elect another officer, when, after admission under the direction of the Court, the six claimants might have voted for whom they preferred.

525. The King cannot by letters patent unaccepted by the Corporation, bestow the freedom of a Corporation upon any individual.

SECTION IV.

ESSENTIALS TO A VALID ELECTION.

I. VACANCY.

526. To a valid election it is essential that there be a vacancy of the office at the time of the election; for one cannot be elected to a corporate office in reversion. Indeed if there be a custom to elect a person who shall succeed into the first vacancy, the Corporation may on the occurring of the vacancy elect another, and set aside the officer elect.

527. So if under a supposition that the place of A. an alderman is vacant, while that of B. who was also an alderman is really vacant, C. be elected into the supposed vacant office of A., his election is void and cannot be referred to the actual vacancy of B.'s office; for although the offices are of the same nature, each is in itself distinct, and the election being specially to the vacant office of A., is no more an election to the vacant office of B. than if they had been officers of a totally different character.

528. So if A. be illegally amoved, and B. elected into his place, and A. afterwards restored in obedience to the

(525) *City of London's Case*, 8 Co. 127.

(526) *Colt v. Bishop of Coventry*, Hob. 150. *Owen v. Stainoe*, Skin. 45.

(527) *R. v. Smith*, 2 M. S. 407.

(528) *Shuttleworth v. Lincoln*, 2 Bulstr 122.

writ of mandamus, the election of B. is void ; for the restoration puts in A. as of his ancient title, and has relation back to the moment of his amotion, from which he continues to have been a legal officer as though he had never been amoved. And the validity of B.'s election depending entirely upon the legality of A.'s removal, B. is not entitled to fill another vacancy, if one should happen in the same body, after the restoration of A. ; but he is returned to the same situation as though A. had never been amoved, and he never elected.

II. AT WHAT TIME.

The head
officer.

529. There is by the constitution of all Corporations a particular day appointed for the annual election of the mayor or other head officer, this is usually called the charter day, and so certainly fixed that doubt can seldom arise.

530. The prescriptive day of election was averred to be at a court-leet held within "one month" after Michaelmas day, and an election was made under color of stat. 11 Geo. I. c. 4. s. 1. on the day after the expiration "of thirty-one days" after Michaelmas day, and it was held void, although the affidavits set forth that in this borough the month had always been computed by the longest calendar month ; for the only month which the common law recognizes under such an averment is the lunar month, and the election ought to have been made on the twenty-ninth day after Michaelmas day.

531. "Whereas in many cities, boroughs and towns corporate within that part of Great Britain called England, Wales, and Berwick upon Tweed, the election of the mayor, bailiff or bailiffs, or other chief officer or officers is by charter or ancient usage confined to a particular day or time, without any provision how to act or proceed in case no election be then made; and it frequently happens that by such charter or usage particular acts are required to be done at certain times, in order to and for the completing of such elections, and by the contrivance or default of the person or persons who ought to hold the court or preside in the assembly where such elections are to be made, or such acts to be done, or by accident it hath sometimes happened, and may frequently do so, if not timely prevented, that no courts or assemblies have been held, or elections made, or such acts done within the time fixed for that purpose; in which cases, if elections of such officers could not afterwards be made or completed, or in consequence of such omission the Corporation should be dissolved, great mischiefs might ensue. Be it enacted, that if in any city, borough, or town corporate, within that part of Great Britain, no election shall be made of the mayor, bailiff or bailiffs, or other chief officer or officers, of such city, borough, or town corporate, upon the day, or within the time appointed by charter or usage for such election, or such election being made, shall afterwards become void, whether such omission or avoidance shall happen through the default of the officer or officers who ought to hold the court, or preside where such election is to be made, or by any accident or other means whatsoever, the Corporation shall not thereby be deemed or taken to be dissolved or disabled from electing such officer or officers for the

Day after
charter day.

future ; but it shall and may be lawful for the members or persons of such city, borough, or corporation, who have right to vote or be present at, or to do any other act necessary to be done, in order to or for the completing of such election, and they or such of them as shall not be hindered by any reasonable impediment or excuse, are hereby required respectively to meet or assemble together in the town-hall, or other usual place of meeting, for making such election within such city, borough, or town corporate, upon the day next after the expiration of the time within which such election ought to have been made, unless such day shall happen to be Sunday, and then upon the Monday following, between the hours of ten in the morning and two in the afternoon of the same day ; and that the members or persons having right to vote at or to do any other act necessary to be done in order to such election, or such of them as shall be so assembled or met together, shall forthwith proceed to the election of a mayor, bailiff or bailiffs, or other chief officer or officers of such city, borough, or corporation, and to do every act necessary to be done in order to or for the completing of such election, in such manner as was usual in, or in order to the election of such officer or officers, upon the day or within the time appointed by charter or usage for such election."

Where the municipality is incorporated by statute, I imagine that an omission to elect on the statutory day will be considered to be within the intention of the act.

Hour of election under the statute.

532. The words "between the hours of ten in the morning and two in the afternoon" are not imperative, but merely directory, and an election may be well begun at any other reasonable time of the day.

533. If the elective assembly be held on the charter day, it may be adjourned to a reasonable hour of the following day, although not between the hours of ten and twelve, and an election at this adjourned meeting is good under this statute, if it be not sustainable at common law. But if the mayor had no power of holding over, it seems that such an adjournment cannot be supported. This was the opinion of Lord Hardwicke and two judges, against Lee J. But in the following term Lord Hardwicke appears not to have been confident in his opinion, and the case was determined upon another point.

Adjourned
assembly.

534. If the mayor be not elected on the prescriptive or charter day, or that appointed by statute, or if having been elected, that election afterwards be found insufficient and void, an election may be had at any time subsequent, under the direction of the Court of King's Bench, by mandamus, warranted by the second clause of the last mentioned statute; and this writ may be awarded, although several years have elapsed since the last legal election, for it is a remedial statute, and to be interpreted beneficially for preserving the constitution of Corporations.

Election
under Man-
damus.

535. The vacancies among other classes being uncertain, there is no usual or charter day exclusively appointed for such elections; but in some Corporations there is a rule introduced either by custom or charter of filling up vacancies in select classes, either on the day appointed for the election of the head officer, or at other times. If the Corporation neglect to supply vacan

Officers of
classes.

(533) R. v. Poole, 7 Mod. 195. S. C. C. T. H. 27. R. v. Carmarthen, 1 M. S. 702.

(534) R. v. Oxford, C. T. H. 178. V. Mandamus to elect.

cies at such times, the Court will issue a mandamus on reasonable cause being shown; and when the classes to be supplied are limited in number, I apprehend that the omission is of itself a satisfactory reason for granting the writ. Of this more will be said under title Mandamus.

Under
Mandamus.

536. A Corporation ought to proceed to an election of officers of a *definite* class, within a reasonable time after a vacancy occurring, for the purpose of preserving the constitution in full vigour, although no particular time be appointed for this purpose; and whenever the neglect has been such as to warrant the interference of the Court, a mandamus for this purpose will be awarded to compel them to do their duty; but unless the neglect is such as to endanger the dissolution of the body, the Court will not interfere to compel an election of new members of an *indefinite* class.

Annual.

537. If the charter declare “quod cives et communitas singulis annis successivis viginti quatuor concives in aldermannos, necnon quadraginta alios cives pro communi concilio civitatis illius eligere facere et creare possint,”—the Corporation may elect all the aldermen and common council annually; yet the Court will not grant a mandamus to proceed to a new election, particularly if the usage have been not to elect annually. I should propose that certain of those having a right to vote in the election, make application to the head officer to convene a corporate assembly, for the purpose of considering the propriety of electing new members of these classes, and if that be not complied with, then to apply

(536) R. v. Fowey, 2 B. C. 596. S. C. 4 D. R. 139, 141. R. v. Gram-pound, 6 T. R. 302.

(537) R. v. Chester, 1 M. S. 102. Prowse v. Foot, 3 Bro. P. C. 169.

to the Court for a mandamus to the head officer and the other persons who should convene, to compel them to hold such an assembly. It was said by the Court, that in this case there is another remedy, but I know not what that is, for there can be no ouster in quo warranto, because the offices of the present aldermen do not determine at the end of the year, but continue until successors are elected.

538. The election of sheriffs or other annual officers, although not the chief officers, is within the provision of the statute last mentioned, and under the second clause of it a mandamus will be granted to proceed to such election.

539. And equally within the provisions of that statute is the election of burgesses and others of a definite class, although neither chief officers nor annually elected, but holding their places for life : this is perhaps an over liberal interpretation of the statute ; but I imagine that the Court is possessed of power to award such a mandamus at common law, by virtue of their supreme authority of administering justice by means of that writ, when a case calls for their interposition, in which the law has provided no other remedy.

Officers for life.

III. ELECTIVE ASSEMBLY.

540. The election must be made at a corporate or select assembly of all those in whom the right of voting is vested, constituted in the manner described under title Assembly.

Assembly of electors.

(538) R. v. Woodrow, 2 T. R. 732. Scarborough Case, 2 Str. 1180.

(539) R. v. Thetford, 8 East, 271.

541. The Corporation was called, the mayor and burgesses of N., and appointed to consist of a mayor, two sheriffs, six aldermen, other officers, and an indefinite number of burgesses; the right of election being in the body at large, was transferred to the mayor, sheriffs, aldermen, other officers and certain of the burgesses, called clothing burgesses, who represented the commonalty, "or so many of them as should be duly assembled together for that purpose." It was advanced in the argument and taken for granted by some of the judges, that if the mayor and one or two burgesses were present, the assembly was sufficient to make a valid election. This of course assumes that the election would have been equally valid had the same number been present before the by-law; for that could not alter the power of election so as to make an act valid which would otherwise have been void for want of a sufficient majority of any select class. Therefore the position must be grounded upon an assumption, that though the aldermen and sheriffs are for certain purposes select classes, they are for the purpose of election a part of the burgesses and members of an indefinite class, of whom it is only necessary that some be present, although not a majority of the whole body. If so, the aldermen and sheriffs would vote, not as aldermen and sheriffs, but as mere burgesses.

Presence of
elected.

542. It is not necessary that the person elected be present at the assembly, so he is within such distance, that he can in due time enter upon the exercise of his office.

(541) *R. v. Ashwell*, 12 East, 28. 31. *R. v. Bird*, 13 East, 285. but see tit. 255. et seq.

(542) *R. v. Courtenay*, 9 East, 261.

543. When corporators vote merely as such in right of their corporate franchise, the president or returning officer has no right to dispute or investigate their title to freedom or office if they are de facto in possession of it.

Title of
electors
may not be
examined.

IV. FORM OF ELECTION.

544. Although there be no form of election prescribed by the custom or charter, every candidate must be proposed singly, whether the election is of members of a definite, or an indefinite class; and if the names of more than one be set down in a list, and the election proposed to be made of the whole by a single vote, such election is altogether void, although the names have been repeatedly read over, and an offer made to strike out any to which an objection should be made, and notwithstanding the election were by the unanimous consent of the entire body. For it may be presumed that instead of using his judgment as to the propriety of admitting any individual which would be the case where they are separately proposed, each elector desirous to obtain the admission of some one in particular may compromise his opinion as to the others, and thus persons may be introduced who would otherwise have been rejected.

Candidates
how pro-
posed.

545. But this is a sufficient proposal upon which the electors may if they choose, proceed in the proper way to vote for any persons whether of the list or others.

(543) *Symmers v. Regem*, Cowp. 507.

(544) *R. v. Monday*, Cowp. 539. *R. v. Player*, 2 B. A. 708.

(545) *R. v. Monday*, Cowp. 530.

What majority of votes.

546. After an election has been properly proposed, whoever has a majority of those who vote, the assembly being sufficient, is elected, although a majority of the entire assembly altogether abstain from voting; because their presence suffices to constitute the elective body, and if they neglect to vote, it is their own fault, and shall not invalidate the act of the others, but be construed an assent to the determination of the majority of those who do vote. And such an election is valid, although the majority of those whose presence is necessary to the assembly protest against any election at that time, or even the election of the individual who has the majority of votes: the only manner in which they can effectually prevent his election is by voting for some other qualified person.

547. If the assembly be duly convened, and the majority vote for an unqualified person after notice that he is not qualified, their votes are thrown away and the person having the next majority, and not appearing to be disqualified, is duly elected.

Election voidable.

548. If the majority voted for a person disqualified, by having omitted to receive the sacrament in proper time under 13 Car. II. before his qualification was made known, since 5 Geo. 1. c. 6. s. 3. his election is only voidable, and not actually void; and if he have been admitted and have held the office for six months, his election is thereby rendered valid from the beginning; or under the annual indemnity act, may be ren-

(546) *R. v. Foxcroft*, 2 Bur. 1020. *Crawford v. Powell*, 2 Bur. 1016. S. C. 1 W. B. 229.

(547) *Claridge v. Evelyn*, 5 B. A. 86. *R. v. Foxcroft*, 2 Bur. 1021. *R. v. Parry and Phillips*, 14 East, 561.

(548) *R. v. Bridge*, 1 M. S. 76. *Crawford v. Powell*, 2 Bur. 1016. S. C. 1 W. B. 229

dered so at any time after admission by receiving the sacrament.

549. If some electors have voted for A. a person so disqualified without notice of the fact, and afterwards, notice having been given of such disqualification, others vote for him, so that the aggregate number of his votes are the majority, all those subsequent to the notice are thrown away, and he stands in the same position as if he had received only the votes given before the notice ; so that if those for any other, against whom no disqualification is shown, exceed them in number, the election of A. is absolutely void.

550. If at an elective assembly some of the electors give their votes for one incapacitated, from neglect to have received the sacrament, and afterwards notice be given of the fact, such electors have a right to vote a second time for any person they think fit ; but it is not incumbent upon the president, the candidates or any other to call upon them to vote again ; and if they neglect pending the election to avail themselves of their right, it is a waiver of it, and the person apparently qualified, who has the greatest number of votes, is duly elected.

551. If the want of qualification be of a corporate character, as if none are eligible to be common-councilmen, who are not previously burgesses, and there being several candidates, some previously burgesses, and others not, and one deficient in that qualification be elected ; it seems that the acts of the assembly are altogether null,

(549) *R. v. Hawkins*, 10 East, 214. S. C. 2 Dow. P. C. 147.

(550) *R. v. Hawkins*, 10 East, 218. S. C. 2 Dow. P. C. 147.

(551) *R. v. Bedford*, 8 Mod. 37.

and the election of such person being void, another assembly may be held, and a person duly qualified elected to fill the vacant place. It may be argued, perhaps, that the electors ought to be conusant of the qualification required by their constitution, and that therefore the votes given for a person so disqualified ought to be considered as thrown away, then the qualified person having the next majority is duly elected: the effect of which would be that the place being already full, an election at a subsequent assembly would be absolutely void.

Poll.

552. If the number of electors voting for each candidate cannot be conveniently ascertained by sight, either of them is entitled to demand a poll for refusal of which an action may be maintained against the presiding officer.

Election
void.

553. If a statute declare that in default of taking the oaths, the election and choice shall be void, no act is requisite to annul it, but the place is actually vacant as though no election had ever been, and not merely voidable; so that another may be elected into the office without the necessity of resorting to an information in quo warranto, to oust the officer elect. This case was upon the statute of 13 Car. II., but had relation to an oath now unnecessary.

554. It seems to be doubtful whether bribery will avoid the election of an alderman; for not being within

(552) *Sterling v. Turner*, 1 Vent. 206. S. C. 2 Vent. 25. S. C. 2 Lev. 50. *Ashby v. White*, 6 Mod. 48. 55, 56. *Shaw v. Colchester*, 2 Mod. 228.
(553) *R. v. Sanchar*, 2 Show. 67.
(554) *R. v. Norwich*, 2 Ld. Ray. 1245.

the statute 5 & 6 Ed. 6. c. 16. it is a question left to the doctrine of common law, and the opinion of Holt C.J. was, that it was not void on this account. But the offering of such a bribe, is the proper subject of an indictment or criminal information.

SECTION V.

ADMISSION.

555. After one is possessed of an inchoate right to the freedom, or has by being duly elected acquired an incipient title either to the freedom or a corporate office, before he can enter upon the enjoyment of it admission is necessary. To this he has such a right, that after application to be admitted, made to the proper officer at a proper time, if the officer refuse, a mandamus lies to compel him to admit the applicant. Of this it will be more fully treated, under title Mandamus to admit. Right of admission.

556. Admission is so essential to the completion of a corporator's title, that if one duly qualified and elected assume to act in that capacity, before he has been admitted, he is a mere usurper, and may be ousted in quo warranto, without a previous amotion. And if one have title by election, either to the freedom or to an office, and be so ousted for want of a due admission, his incipient title is destroyed, and he cannot afterward perfect it by admission, but must be a second time elected. The inchoate right to the freedom would not, I apprehend, be affected by ouster from the franchise Title incomplete until admission.

(555) Townsend's Case, T. Ray. 69. S. C. 1 Lev. 91.

(556) Townsend's Case, T. Ray. 69. S. C. 1 Lev. 91. R. v. Clarke, 2 East, 83. V. tit. Quo Warranto, Judgment.

of being a freeman, for want of a legal admission; but such a title might be subsequently perfected by admission.

The different rights of election and admission.

557. It may be said that the right to the office is derived from election, but the right to the exercise and enjoyment of it is acquired by admission.

Effect when there is power to hold over.

558. If a mayor or other officer has right to hold over until a successor is elected and sworn, his office is not determined by the election, but by the due admission and swearing in of the successor, who cannot act until his title is so perfected.

I. WHEN ADMISSION MAY BE.

On a different day from that appointed.

559. Yet admission is an act so purely ministerial, that it may be done by the proper officer or officers at any time; although there is a day and place expressly appointed for that purpose by custom statute or charter, it may be completed at another time and place. Therefore, if the time appointed by the constitution for admitting the mayor to his office is at the court-leet, held a month after the day of his election, and instead of waiting that time he is admitted on the day of his election or the day subsequent, it is a valid act, and his title to the office is complete, although the effect of it is to bring him into office a month before the usual time.

Under stat. 11 Geo. I. c. 4. s. 1.

560. Where, according to the custom, the mayor is elected on a particular day by the corporate body, and

(557) *R. v. Hull*, 11 Mod. 391.

(558) *Pendar v. Regem*, 3 Bro. P. C. 174.

(559) *R. v. Nance*, 7 Mod. 340. S. C. Sel. N. P. 959.

(560) *Id. ibid.*

sworn in by the town clerk in the presence of the preceding mayor at a court-leet held by the steward of the manor at the end of the following month, and the preceding mayor has no power of holding over; if an election be made on the day following the prescriptive day by virtue of this statute, the person then elected must be sworn in, according to its directions, before the next in place who presides instead of the mayor; this should be at the time of election, but may be on a subsequent day. The swearing in is not to be at the court-leet according to the custom, for the new mayor is altogether a creature of the statute and there is no injury done to the lord of the leet; for as the Corporation had otherwise been dissolved, he would have lost his franchise, and the customary right of swearing would have been determined, but that it is saved by the statute, which in this instance transfers it to the presiding officer, and leaves it for the future in the lord.

561. It may be done when the proper persons have met accidentally, or at an assembly expressly convened for any other business, although notice have been given that no business except that will be entered upon, and although an equal number of the proper persons have previously protested against entering upon the discussion of any affair, except that for which they are assembled. For unless the majority openly express their dissent at the time the admission is proposed, their assent is implied; it being an act which they are bound to do, the Court will not presume that they have acted contrary to their duty where the circumstances are of an equivocal character.

At what assembly.

When re-
trained by
express
provision.

562. Where the charter says, that if those who possess inchoate rights make application to be admitted, they shall be admitted "on a certain day, and at no other time,"—it is only necessary that they make their claim and tender their qualification on that day; for if there is not time to admit all who make their claims before the latest convenient hour of it, the Court must adjourn from day to day until they have investigated all the claims, and admitted all the applicants. They have an incidental power of making this adjournment, notwithstanding the restriction of the charter to "that day, and no other time."

May be
claimed at
any time.

563. If not expressly restrained, those who are entitled to their freedom have a right to claim admission at any convenient time they think proper; for which reason, if the prosecutor have applied to be admitted at a reasonable time but not on one of the days particularly appointed, and having been refused, a mandamus to admit is awarded him; the defendant must show in the return that the admission is appointed to be on those days, "and at no other time;" for the showing that there are certain courts held in the course of the year for admitting those who apply, is not of itself sufficient to exclude the general right of admission at another time.

However
long after
election,
unless there
has been a
waiver.

564. A person may be admitted at almost any distance of time after his election, unless, from subsequent transactions, there is reason to presume a waiver of the election, and an acceptance of it by the Corporation. The lapse of twenty-five years is not of itself a bar to

(562) *R. v. Carmarthen*, 1 M. S. 702.

(563) *R. v. Whiskin*, Andr. 3.

(564) *R. v. Jordan*, C. T. H. 257. *R. v. Courtenay*, 9 East, 260. 263.
et seq.

his admission ; but if, having had notice of the election within a reasonable time after it took place, he have lain by that number of years, and another has in the meanwhile been elected to fill the same office, without his making any objection, this is such evidence of a waiver, that a subsequent admission will give him no right to the office.

II. WHO ARE TO ADMIT.

565. If there be no provision made for admission by any particular persons, it may be doubtful whether the right is vested in the Corporation at large, to be executed at a corporate assembly in all respects (except notice) duly convened ; or whether it is vested in the head officer alone, as the executive of the Corporation for the discharge of ministerial acts of this nature ; or whether it is incidentally vested in that body which makes the election, whether the Corporation at large or a select class. If the charter impose an oath of office, and do not empower some one to administer it, there is no incidental right of doing so in the mayor or any other, but the Corporation must sue to the chancery for a *dedimus* to appoint a proper officer to administer it. Incidental right, in whom.

The act of admission is seldom left unprovided for by the constitution : the following cases have been determined on the particular construction of charters.

566. If the admission and swearing in is to be before the mayor and aldermen, there can be no valid admission. Right by construction of statute.

(565) *R. v. Wake*, 1 Barnard. 80. *R. v. Decan' et Capital'* Dublin, 1 Str. 537. *R. v. Courtenay*, 9 East, 265.

(566) *R. v. Buller*, 8 East, 392. *R. v. Corry*, 5 East, 379. *R. v. Norris*, 1 Barnard. 385.

sion by the rest after the mayor has left the assembly. But if the charter provide that the person elected shall be sworn in before the last mayor, if alive and present, and in the presence of the aldermen, but if the mayor be dead or absent, then in the presence of the aldermen, this is a clear dispensation with the presence of the mayor in all cases, and he cannot be punished for non attendance.

Whose assent necessary.

567. If the charter empower the mayor and aldermen to elect burgesses and to the same to administer the oath, the mayor and a majority of the aldermen must be present at the admission as well as the election, but it is doubtful whether the admission and administering of the oath with the assent of the mayor be not sufficient, although all the aldermen refuse their acquiescence.

568. "The mayor, bailiff or bailiffs, or other chief officer or officers who shall be elected pursuant to the directions of this act (v. tit. 531.) shall take the oath or oaths by law required, at the time of his admission into such office, before such officer as shall preside at such election in pursuance of this act (v. tit. 108), who is hereby authorized and required to administer such oath or oaths."

Before whom under statute.

Under this statute, where the next in place to the mayor presides, he alone has the right of admitting the new mayor and a swearing in before the three next "to him" in place is void.

By ministerial officer.

569. The usual manner of admitting is for the town clerk to administer the oaths and admit, but this he

(567) R. v. Courtenay, 9 East, 265.

(568) 11 Geo. I. c. 4. s. 4. R. v. C. Malden, 4 Bur. 2132. V. tit. 560.

(569) R. v. Ellis, 2 Str. 994. S. C. in R. v. Courtenay, 9 East, 253. n.

does as a ministerial officer, so that no sanction is derived from his act, unless it be by the consent of those in whom the right is vested. Therefore, whether the oath is to be administered "by" or "before" the mayor or others, an admission by the town clerk or other usual officer, in the presence of the mayor or the other persons *against* their consent, is insufficient.

570. The consent of the persons in whom the power of admitting is reposed is indispensably necessary; but as the act is one to which the officer elect has a legal right, such as may be enforced by mandamus, the Court will presume their assent, when there is no distinct evidence of the contrary, or the facts are upon the whole doubtful; for all officers are assumed to do their duty, until the contrary appears.

Dissent
must be
manifest.

571. The dissent, to be effectual, must be manifested at the time of the attempted admission, but when it is incontrovertible, as if the proper persons are prevented in an endeavor to escape out of the room to avoid giving it their sanction, or if they openly declare their dissent, the pretended admission is void.

572. The effect of the consent of the officer, who has the sole right to admit, being requisite to the validity of the act, is to exclude him from being eligible to offices where his admission is necessary, for there were an inconsistency in permitting him to consent to his own admission; on this account the person who pre-

None can
be sworn
before
themselves.

(570) *Oldknow v. Wainwright*, 2 Bur. 1021. *R. v. Courtenay*, 9 East, 265, 266.

(571) *R. v. Courtenay*, 9 East, 266. *R. v. Duke of Bedford*, 1 Barnard. 281.

(572) *R. v. Harper*, 5 East, 219. *R. v. C. Malden*, 4 Bur. 2132. *V. tit. 496. R. v. Nance*, 4 Mod. 337.

sides instead of the mayor, under the statute 11 Geo. I. is ineligible to the mayoralty.

573. So when the admission is before himself and one or two others, being principal officers, as where the new mayor and two bailiffs are to be admitted by the mayor and two bailiffs of the preceding year, neither of the preceding mayor or bailiffs is eligible to either of these offices.—This is not an exact statement of the case, but a necessary inference from it.

574. But it seems that where the mayor is eligible out of the body at large, an alderman is not ineligible merely because the mayor is to be admitted by the mayor and aldermen.

III. FORM OF ADMISSION.

Oath of office.

575. There is a form of admission prescribed by the constitution of all Corporations, and there can be no legal admission where it is not observed. It generally consists in taking the oaths of office, and a proper entry of the admission in the Corporation books, which is a matter of record: a deed under the Corporation seal is unnecessary, unless specially required. In fact the essence of the admission is the administering of the oaths, of which the entry is merely evidence. But an allegation of a custom to administer the oath “before” admission is sufficient; for the oath having been taken, the person is by that act admitted, or if any further act be necessary after the swearing, the Court will grant a mandamus to perform it.

(573) *R. v. Harper*, 5 East, 220. V. tit. 495.

(574) *R. v. Harper*, 5 East, 215.

(575) *R. v. Bosworth*, 2 Str. 1113.

576. There may be a good custom that the oath shall be on the New Testament, even in trading cities, to the freedom of which there is no reason for excluding those who are not Christians ; but if a Jew apply to the Court for a mandamus to be admitted, it is in vain to dispute the custom, he should apply for a special mandamus to be admitted on taking the oath of his nation ; but the opinion of the Court appeared to be against the admissibility of Jews. So a quaker who would be precluded by his scruples from taking any oath, is entitled to admission on making his solemn affirmation instead of an oath ; and his application for a mandamus, that he may be admitted on so doing, will be granted.

Custom that it shall be on the New Testament.

577. When the steward of a court-leet is bound to enroll the names of those qualified, and administer to them the oath of allegiance, this is a legal admission for the purposes connected with that Court, and after a refusal to do so, a mandamus will be granted on a proper application.

What amounts to an admission.

578. "No master, wardens, or fellowships of crafts nor any of them, nor any rulers of fraternities, guilds, or brotherhoods, from henceforth compel or cause any apprentice or journeyman by oath or bond or otherwise, that he after his apprenticeship or term expired, shall not set up nor keep any shop, house, or cellar, nor occupy as a freeman, without licence of the master, wardens, or fellowship, of his or their occupation, for and concerning the same" on penalty of 40*l.* one half to the king and one half to the informer.

(576) *R. v. Bosworth*, 2 Str. 1112, 1113. *R. v. Morris*, 1 Ld. Ray. 337. *R. v. March*, 2 Bur. 1004.

(577) *R. v. West Looe*, 3 B. C. 686. S. C. 5 D. R. 600.

(578) 28 H. VIII. c. 5.

579. "Every person and persons so placed, elected, and chosen, (v. tit. 506.) shall take the oaths of allegiance and supremacy at the same time when the oath for the due execution of the said places and offices respectively shall be administered, and in default thereof every such placing, election and choice shall be void."

580. These oaths "shall be tendered and administered by such person or persons respectively, who by the charters or usages of the said respective cities, corporations, and boroughs, and cinque ports, and their members, and other port-towns, ought to administer the oath for due executing the said places or offices respectively, and in default of such by two justices of the peace of the said cities, corporations, and boroughs, and cinque ports, and their members and other port-towns for the time being, if any such there be, or otherwise by two justices of the peace for the time being of the respective counties where the said cities, corporations, or boroughs, or cinque ports or their members, or other port-towns are."

Extends to
all Corporations.

581. The statute of Charles extends to Corporations subsequently created, as well as those which were in existence at the time of its enactment; on which account it is not necessary to show in the pleadings, that the Corporation, into an office of which the unqualified person is elected, was at that time in being.

The oaths
must be de-
manded.

582. The person elected must take the oaths at his peril, and demand that the proper officer administer

(579) 13 Car. II. st. 2. c. 1. s. 12. as altered by 5 Geo. 1. c. 6. s. 3.

(580) 13 Car. II. st. 2. c. 2. s. 10.

(581) *Guilford v. Clarke*, 2 Vent. 247. *R. v. Aldborough*, 10 Mod. 101.

(582) *R. v. Thacker*, Sir T. Jones, 121. *R. v. Oxon*, 2 Salk. 429. *R. v. Slatford*, 5 Mod. 317. V. tit. Mand. Return, Admit.

them to him. It is not, perhaps, incumbent upon the officer to tender, but if he refuse to administer them upon demand, a criminal information will be granted and a fine imposed by the Court, and a mandamus will be awarded, to compel him to do his duty. But to a mandamus to admit, it is a good return, that the person elected has not taken these oaths. Perhaps it may be a sufficient ground to sustain an action for damages for loss of the place, if the officer neglect to tender them.

583. The last and preceding annual indemnity acts contain a proviso for the stamping of admissions, where it had been neglected in proper time. Admission stamps.

584. If the admissions of several freemen are made upon upon one stamp, that of the first named is good, but those of all the others are void.

585. "If any mayor, bailiff, sheriff, town clerk, or other officer of any Corporation, or other person whatsoever, shall wilfully and fraudulently antedate or cause to be antedated any admission of any freeman, such mayor, bailiff, sheriff, town-clerk, officer, or other person shall for every such offence forfeit and pay the sum of 500*l.* to him, her or them who shall inform and sue for the same within one year." Antedating admission.

586. The admission gives no title to the officer; it only admits him to the exercise of the office to which he is presumed to have had an antecedent title, which may be questioned and defeated. Effect of admission.

(583) 6 Geo. IV. c. 3. s. 6.

(584) *Gilby v. Lockyer*, Doug. 207.

(585) 3 Geo. III. c. 15. ss. 3. 6.

(586) *Owen v. Saunders*, 1 *Ld. Ray.* 159.

SECTION VI.

REFUSAL OF OFFICE.

Penalty imposed by a by-law.

587. A Corporation has a right to the service of all its members in those offices to which they are capable of being elected; for this reason, if one be elected, and refuse the office, he will be compelled by the Court to undertake it. And a by-law may impose a penalty upon him for the mere refusal, although he remains liable to service after paying the penalty: or the by-law may release him from the service by treating the penalty as a compensation.

Imprisonment by custom.

588. The manner of punishing members by levying a penalty on them for refusal to serve an office, has been already treated under title By-law; and under title Custom, it has been shown that there may be a custom to imprison for this offence.

Indictment.

589. Besides these methods of punishing a refusal of office, when the public sustains an injury from it, as by its impeding the administration of justice in the municipality, it amounts to a misdemeanor for which the recusant may be indicted.

590. An indictment against a constable for refusing the office, must show a prescription in the Corporation to elect such an officer; for it will not be intended that they have constables, for at common law constables must be appointed at the court-leet.

(587) R. v. Samuel Bower, 1 B. C. 587. S. C. 2 D. R. 843.

(588) R. v. Bedford, 1 East, 80. V. tit. 298. London v. Vanacre, 1 Ld. Ray. 499.

(590) R. v. Bernard, Skin. 669. V. tit. 432.

591. But it is not an indictable offence to refuse on an anterior day to agree to accept the office on the day when he ought to enter upon the execution of it; for when that day arrives he may perhaps undertake it, and the public receives no injury from the first refusal.

592. Where an indictment, from the dilatoriness of the proceeding, will not accomplish the same object, the Court will award a criminal information. In this case, the office was annual, and the administration of justice in the municipality had been altogether impeded, no sessions having been holden in the city since the election, in consequence of the defendant's refusal.

Criminal
informa-
tion.

593. But a criminal information will be granted only in cases where the office affects the public interest, such as the office of mayor or sheriff of a town, by whose refusal the administration of justice is impeded. And not where the office is purely corporate, although a qualification for the service of public offices, as for refusing the office of common-council-man, although the sheriffs are eligible from among them alone.

594. Neither will it be granted, where there is a fair doubt on the person's liability to serve: on this ground it was refused, where the application was against a protestant dissenter who had qualified under the Toleration Act, there being a by-law of the Corporation which the Court left them to enforce against him if they could. But in a former case an information was granted against a dissenter for such a refusal; it does not however ap-

(591) *London v. Vanacre*, 12 Mod. 272. S. C. 1 Ld. Ray. 499.

(592) *R. v. Woodrow*, 2 T. R. 732.

(593) *R. v. Hungerford*, 11 Mod. 132. 142.

(594) *R. v. Grosvenor*, 1 Wils. 18. S. C. 2 Str. 1193. *R. v. Larwood*, 2 Vent. 248.

pear, whether that Corporation had provided any by-law on the subject. These cases are cited, because analogous cases may arise; but it is now settled, that dissenters are not liable to serve if they have not received the sacrament.

595. Nor will it be granted, when it appears that the person did not accept the office rather from the situation of his own affairs than from any wilful neglect, particularly if the Corporation may find a more proper person to serve; at least, where there is a by-law they will be left to try first the effect of enforcing it against him. As where, from the nature of his business, the person is absent from the place a great proportion of his time.

What is a
refusal of
office.

596. When the recusant is disqualified on account of not having received the sacrament, he is protected by the Toleration Act in certain cases only: if therefore he have not qualified under that act, it still remains a question whether he is liable to the penalties of refusal, and the opinion of the Courts seems to be that he is. It was held in the case of *Larwood*, by three judges, that the intention of the statute of Charles was to compel all persons to receive the sacrament for the purpose of accepting corporate offices, and therefore that neglect to receive it, being a wilful incapacity, was equivalent to a refusal to serve, and rendered the person liable to the penalties and punishment of refusal. But a preceding case was determined on the ground that this statute operated merely as an exclusion of such persons from office, as were suspected by the king of entertain-

(595) *R. v. Denison*, 2 Kenyon, 260.

(596) *R. v. Larwood*, 1 *Ld. Ray.* 31, 32. *S. C. Skin.* 575. *S. C. 4 Mod.* 270. *S. C. 12 Mod.* 69. *Starr v. Exon*, 3 *Lev.* 117.

ing opinions contrary to the established government and church principles, and that therefore an exclusion from office was the only punishment intended. Of this opinion also, were Sir S. Eyre, and the Lord Keeper, against the three judges in the case already mentioned. And whether it be the doctrine of law or not, it is the only doctrine consonant with policy and common sense ; for the contrary would be not only intolerant of conscientious opinions, but repugnant to the sentiments of every generous mind, and would operate to introduce into places of trust those dissenters alone who were renegades to their principles for the sake of avoiding punishment, to persecute with pains and penalties those whose sense of right prevents their compliance, and would afford Corporations an opportunity of accumulating money by electing those only to office who were precluded by the law from entering upon the discharge of its duties. The only topic which can be urged in defence of the doctrine is, that no one is compellable to become a freeman of the Corporation, and so may avoid incurring the chance of being elected ; but in many Corporations this would be to exclude tradesmen earning their subsistence in the municipality.

597. A refusal to take the oaths of allegiance &c. imposed by the statute is equivalent to a refusal of the office, and renders the recusant equally liable to the penalties, for it is a refusal of that without which the office is void and cannot be held.

SECTION VII.

APPOINTMENT OF MINISTERIAL OFFICERS.

By whom. 598. The appointment of ministerial officers is sometimes by the choice of the whole or of a part of the Corporation, sometimes by a particular officer only. In the former case there must be an election as of corporate officers.

Of whom. 599. Ministerial officers may be selected from those who are not members of the Corporation, unless the constitution impose a restraint; and they do not become members by virtue of their office, unless by special provision of the custom or charter.

When not corporators.

In what form. 600. Ministerial officers may sometimes be appointed by a mere entry in the public books, at times, even that may be unnecessary: in other instances they must be appointed by deed under the corporate seal. Sometimes there is an oath attached to their office, but frequently no oath is required.

Without deed. 601. The mayor and commonalty may assign auditors without deed, or appoint a bailiff to make a distress, or a cook or butler.

By deed. 602. But a bailiff cannot be appointed without deed to make a seizure of goods on behalf of a Corporation; nor can they without deed appoint one to appear as their bailiff in an assize, or to make claim to lands, or to take

(601) 3 Jenk. Cent. 68. 1 Salk. 191.

(602) Horne v. Ivy, 1 Vent. 47. S. C. 1 Mod. 18.

their trees, or enter upon land for a condition broken ; nor can they without deed assent to a disseisin made for them, because the doing of such things does not fall within the ordinary duty of a mere bailiff, as the making cognizance for a distress does.

603. The attorney to appear for them in quo warranto, must be appointed by warrant under the corporate seal ; and where there are two seals, one used by the mayor for the purpose of sealing those deeds which he alone has a power of executing, and another for sealing those which the whole Corporation make, the appointment must be under the latter. But in the case in *Salkeld*, there is a quære, whether an attorney appointed by one of two bailiffs, to appear to an information against the Corporation is not sufficiently constituted, if the Corporation do not disavow the appointment.

604. An attorney to plead in abatement on behalf of a Corporation, must be appointed by a special warrant allowed by the Court.

605. When the principal office lies in grant, the Deputy. deputy must be appointed by deed.

606. If a deputy be appointed by the Corporation in the presence and with the acquiescence of the principal, he is not the officer of the Corporation, but the representative of the principal ; the act of the Corporation is referable to him, and must be construed to be his appointment, so that on the determination of the office of the principal, the deputyship is instantly terminated ;

(603) 3 Salk. 104. R. v. Chester, 2 Show. 366. S. C. Skin. 154.

(604) V. tit. 49.

(605) *Owen v. Saunders*, 1 Ld. Ray. 159. R. v. Lenthal, 3 Mod. 147.

(606) R. v. Bedford, 6 East, 366.

for it cannot be regarded as a new office created by the Corporation.

Mandamus to admit a ministerial officer.

607. A mandamus lies to admit a ministerial officer who is not a mere officer at will to his office, and to swear him in, but not to admit him into the Corporation unless he becomes a member of it by virtue of his office.

A deputy.

608. So a mandamus lies on the application of the principal, to swear in the deputy of an officer to such office and for such purposes as he has a power of appointing a deputy, but no further. But it will not be granted on the application of the deputy.

Liability to serve.

609. None but corporators of the class liable to serve any office, can be punished for refusing it.

(607) Case of a Town Clerk, and *R. v. Westminster*, Comb. 244. *R. v. London*, 2 Barnard. 398. *R. v. London*, 2 T. R. 182. et n. *V. Mandamus to Admit, and Return*.

(608) *R. v. Clapham*, 1 Vent. 111. *R. v. President des Marches*, 1 Lev. 306. *R. v. Gravesend*, 2 B. C. 604. S. C. 4 D. R. 117.

CHAPTER IV.

AMOTION, &c.

THIS chapter treats of the manner in which an office legally acquired may be subsequently vacated or the freedom lost, either by the agreement of the corporator with the body of which he is a member, or by his misconduct and the Corporation resorting to its power of punishing him by amotion. It is divided into four sections :—

- I. Resignation.
- II. Forfeiture.
- III. Formal Amotion.
- IV. Disfranchisement.

There is no other manner in which a person who has legally entered upon an office or acquired the freedom can relinquish or be dispossessed of it, for the writ and information in the nature of quo warranto are applicable only to those cases in which the officer never had a legal title, but was a usurper from the beginning, or where having once been legally in office he has ceased to be so by amotion or resignation, and has subsequently exercised it by mere usurpation.

SECTION I.

RESIGNATION.

An office may be resigned in two ways; either by an express agreement between the officer and the Corporation, or by such an agreement implied from his being elected to another office incompatible with it: and perhaps, what is esteemed among the causes of amotion, such a non-residence as to be evidence of an abdication of office and desertion of the municipality, might with greater propriety be introduced in this place as an implied resignation.

By deed.

610. When the officer is appointed by an instrument under the corporate seal a similar instrument is necessary to effect a sufficient resignation. But where a deed is necessary, a return that he resigned is sufficient, for that is an implied allegation of a resignation according to the forms which are required by law, and the deed need not appear to the Court on the pleadings, but must be produced at the trial in support of the general averment.

By entry in
Corporation
book,
&c.

611. If the officer be constituted by election, of which an entry is made in the public books, no instrument under seal is necessary to determine the office, but the resignation may be made by parol and completed by a similar entry, which manifests the assent of the Corporation to the proposal of the corporator who offers to resign.

(610) *R. v. Chalke*, 1 Ld. Ray. 226. *Manley v. Long*, 3 Lev. 107. *R. v. Rippon*, 1 Ld. Ray. 563. *Potter v. North*, 1 Sand. 347. n. 4.

(611) *R. v. Chalke*, 1 Ld. Ray. 226. *R. v. Rippon*, lb. 563.

612. When the constitution prescribes a particular form in which the resignation is to be made, that must be complied with in all respects. But otherwise an alderman or capital burgess, and of course inferior officers, may resign by letter to the Corporation, as is the manner in London, or by word of mouth, as by declaring before a corporate assembly that he resigns his office or will continue no longer in the Corporation, and requesting them to accept his resignation. But if a man speaking at large, declare that he will be no longer an alderman, this does not amount to an offer to resign.

613. To complete a resignation it is necessary that the Corporation manifest their acceptance of the offer to resign, which may be done by an entry in the public books, or electing another person to fill the place, treating it as vacant. It has been said, that although the Corporation have accepted the offer to resign, yet that the officer may at any time revoke it, until the Corporation have elected another into his place.

Acceptance
of resigna-
tion.

614. It is sufficient in a return to a mandamus to restore an officer, to aver that the prosecutor has duly "resigned" his office in general terms, for such an averment implies all things which the law holds essential to a resignation; therefore if a deed be requisite, it is implied in this general averment, under which on the trial such deed must be produced; so if a new election be

Pleaded.

(612) *R. v. Chalke*, 1 Ld. Ray. 226. *R. v. Rippon*, 1 Ld. Ray. 563. S. C. 2 Salk. 433. *R. v. Lane*, 2 Ld. Ray. 1304. *Jenning's Case*, 12 Mod. 402. *Hazard's Case*, 2 Rol. 11. *R. v. Excter*, Comb. 197.

(613) *R. v. Lane*, 2 Ld. Ray. 1304. S. C. 11 Mod. 270. S. C. *Fortes*. 275. *R. v. Rippon*, 1 Ld. Ray. 563. 2 Salk. 433. S. C. *Jenning's Case*, 12 Mod. 402. *Hazard's Case*, 2 Rol. 11.

(614) *Verrior v. Sandwich*, 1 Sid. 305. and authorities in last paragraph.

necessary, perhaps it need not be averred, but shall be implied in the general allegation. Yet where the resignation is by implication, it is not sufficient to aver it in general terms, but all the important facts must be shown, that the Court may have an opportunity of examining whether they amount to a resignation.

Acceptance
by select
body
shewn.

615. Every Corporation has an incidental power of accepting the resignation of its officers, and therefore when it is averred generally, it should be shown that the resignation was made to a corporate assembly; and if the right to receive it be in a select body, that ought to appear on the pleading, and how it was acquired by them.

Whether
incidental
to right of
election.

616. I presume that a right to accept a resignation passes incidentally with the right to elect; for it is not a power to be compared to that of amotion, and it seems that an office should be relinquished by the consent of those in whose authority it originated.

Implied re-
signation.

617. A resignation by implication, is where a person holding one office is appointed to, and accepts another incompatible with it. At one time it was thought that such a resignation could only be where the second office is superior to the former: but it has been determined to be quite unimportant, and that if one holding a superior office, accept another subordinate and incompatible, the appointment to the second office is legal, and operates to vacate the former. This is an absolute

(615) *R. v. Tidderley*, 1 Sid. 14. *V. Hazard's Case*, 2 Rol. 11.

(616) *Id. ibid.*

(617) *Gabriel v. Clarke*, Cro. Car. 138. *Verrior v. Sandwich*, 1 Sid. 305. *R. v. Godwin*, Doug. 383. n. 22. *Milward v. Thatcher*, 2 T. R. 87. *R. v. Pateman*, 2 T. R. 779.

determination of the original office, and leaves no shadow of title in the possessor; so that neither quo warranto nor amotion is necessary before another may be elected.

618. The office of mayor, alderman or jurat, being judicial officers, is incompatible with that of recorder, who is an adviser to them. Alderman, &c. and Recorder.

619. So are such offices incompatible with that of town clerk, when the latter is the minister to the former; and it is unimportant that on account of the number of jurats, &c. it is not in general necessary for the town clerk to sit in that capacity, for the constitution requires that the officers shall be effective and capable of discharging their duty, and his presence may be necessary on account of the absence or sickness of others. But where the aldermen or jurats are not judicial officers, there is no necessary incompatibility between their functions and that of town clerk. Town clerk and alderman, &c.

620. A financial officer may be elected an alderman, although the auditors of his accounts are selected from among the aldermen, but he cannot be appointed one of the auditors: it is said that such an appointment vacates his financial office; but I imagine that this is not correct, and though the offices are incompatible, an appointment to the latter with acceptance, does not vacate the former, for such appointment would be rather void, in as much as the audit may be of former accounts, Financial officer, and auditor of his accounts.

(618) *R. v. Marshall*, cited in *R. v. Trevenen*, 2 B. A. 341.

(619) *Verrior v. Sandwich*, 1 Sid. 305. *Milward v. Thatcher*, 2 T. R. 87. *R. v. Pateman*, 2 T. R. 779. *Baston's Case*, Poph. 176. *S. C. Noy*, 78. *S. C. Dyer*, 332. b. notis.

(620) *R. v. Godwin*, Doug. 383. n. 22. *R. v. Pateman*, 2 T. R. 779.

and therefore the anterior office should be regarded rather as a disqualification for the latter, than an office simply incompatible.

Steward
and port-
reeve.

621. The offices of steward and portreeve may be incompatible where a Court is to be held before them; for the public may be entitled to the opinions of two men, of which advantage they are deprived, when both offices are vested in the same person. But if the pleadings allege that A. was steward and portreeve, the opposite party must either deny that he is steward, or that he is portreeve, for if the offices are incompatible, in as much as acceptance of the latter is an abdication of the former, he is not steward *and* portreeve, but holds only the latter of these offices: and if issue be not taken upon this fact, it will be considered as admitted by the subsequent pleading, that he is both steward and portreeve, after which the opposite party cannot be allowed on demurrer to question the compatibility of the offices.

Capital bur-
gess and
steward.

622. There is no apparent incompatibility in the offices of capital burgess and steward (a superior office in the Corporation), particularly where there has been a usage for upwards of a century, for the same person to fill both offices; but perhaps if the burgess be elected mayor, this office is incompatible with that of steward. Nor does there appear to be any incompatibility between the offices of mayor and coroner, which in some Corporations are united in the same person, as in London, where some of the duties of the coroner are discharged by the sheriff.

(621) *Green v. Davis*, 3 B. A. 63.

(622) *R. v. Trelawny*, 3 Bur. 1616. *City of London's Case*, 8 Rep. 126. a. *Utlagerie*, *Dyer*, 317. Co. Lit. 288. b.

623. But election of an officer to an incompatible office does not vacate the former before acceptance by the officer, for although a Corporation has a right to the service of all its qualified members, in any office to which they elect him, yet having already appointed him to one, that is a temporary disqualification, which renders him ineligible to the other, and the Corporation having chosen to elect him, must be presumed to have been aware of that circumstance, and to have precluded themselves from calling again upon his services. Therefore, if on pretext of electing the mayor to be town clerk, or the town clerk to be mayor, they exclude him from his former office, a mandamus will be granted to restore him to it, unless he has precluded himself by assenting to his election into the other.

Election to incompatible office, if unaccepted, is void.

624. Where the offices are not in fact incompatible, acceptance of a second may be a resignation of the first on account of the form of the constitution; as if the Corporation is to consist of a mayor, recorder, town clerk and twelve aldermen, the recorder or town clerk cannot be an alderman, although there be no inconsistency in the duties of the two officers, for such a method of electing would reduce the Corporation to a mayor and twelve or thirteen other officers instead of fourteen, of which it ought invariably to consist; for it cannot be presumed that, when the crown constituted a certain number of distinct offices, it intended that the Corporation might consolidate two or more of them in one person.

Offices which may not be consolidated.

(623) *Baston's Case*, Poph. 176. S. C. *Noy*. 78. S. C. *Dier*, 332. b. notis. *Milward v. Thatcher*, 2 T. R. 88. R. v. *Pateman*, 2 T. R. 779.

(624) *Milward v. Thatcher*, 2 T. R. 88.

SECTION II.

FORFEITURE OF OFFICE.

Actual ces-
ser of office.

625. There may be a forfeiture of a corporate office, in which case the officer is actually out, and the office ipso facto vacant, so that another may be elected to fill it without its being necessary to resort to an amotion or proceedings in quo warranto. But the case of Lord Bruce does not come within the rule, and cannot be much relied on as authority to this purpose.

Few in-
stances of
such for-
feiture.

626. There are but few cases in which such a forfeiture can occur, for if the statute provide that an alderman shall remain in office no longer than he continues to reside within the municipality, his non-residence does not in fact vacate the office, and there must be an amotion before another can be elected. Neither, it seems, does conviction of an infamous offence, such as perjury or forgery, vacate the office without amotion.

Effect of
outlawry.

627. Even outlawry is not an absolute forfeiture of office, but such a temporary disability that one amoved cannot obtain a mandamus to be restored from the time of the outlawry to that of the reversal; and outlawry is a sufficient return to such a mandamus in general terms, so as to preclude an examination of the formality of the amotion, or even the sufficiency of the cause; and so great is the disability, that if the return be double, setting forth first an insufficient cause, and then the outlawry, no restitution will be awarded. But if the writ

(625) *R. v. Ponsonby*, Say. 247. Lord Bruce's Case, 2 Str. 819.

(626) *Vaughan v. Lewis*, Carth. 229.

(627) *R. v. Bristol*, 1 Show. 288.

recite the outlawry, and also its reversal, a legal amotion must be shown, or a peremptory writ will go.

628. Indeed it may be more proper to define a forfeiture of such an office as that of alderman, in which the occupant has a freehold, to be the committal of such a civil or corporate offence, as is a sufficient cause of amotion, and not merely such an offence as *ipso facto* vacates the office.

SECTION III.

FORMAL AMOTION.

Amotion applies only to officers ; for the removal of a corporator from the freedom is a disfranchisement, which a simple amotion does not by any means effect.

This section is reduced into several subdivisions—

1. Who may amove.
2. When they may amove.
3. For what cause.
4. In what form.
5. Effect of an amotion.

And several of these subdivisions will be again divided for the purpose of presenting an analytical view of the subject.

I. WHO MAY AMOVE.

629. If the power of amoving any officer be not expressly confided to a particular person or class, it is Incidental power.

(629) Lord Bruce's Case, 2 Str. 819. R. v. Lyme Regis, Doug. 153. R. v. Doncaster, Say. 38. 249. R. v. Richardson, 1 Bur. 539. R. v. Ponsonby, 1 Kenyon, 29. R. v. Feversham, 8 T. R. 356.

incidental to the Corporation at large, and not to the person or class in whom the right of appointing or electing such officer is vested ; for this reason, whenever an amotion is pleaded, unless the authority by which it is transferred to a select class be shown, it will be intended to remain in the body at large, and must be proved to have been exercised by the whole Corporation.

Customary power, when not altered by charter.

630. If the power of amoving certain officers be antecedently in a select body ; and the Corporation accept a new charter silent upon that head, but making other alterations and recognizing or confirming such body, although under a different name, and in general terms confirming the Corporation in all cases where no alterations are introduced, the right of amotion still continues in this select body.

Who may amove a ministerial officer.

631. If the charter give the "mayor for the time being" power to appoint a town clerk, he has power to amove the town clerk appointed by his predecessor without any notice or formality, and may exercise it by simply appointing another.

Amotion by order of the Privy Council.

632. If the charter reserve to the king a power of amoving the corporators at pleasure, or of so doing and appointing others in their places, it is void in toto, and not merely as to the power of amotion.

633. But it has been subsequently held, that where the provision is, that the King may by his order amove

(630) Haddock's Case, T. Ray. 439. R. v. Knight, 4 T. R. 429.

(631) R. v. Campion, 1 Sid. 15.

(632) R. v. Wynn, 2 Barnard. 391. R. v. Carlisle, 1 Str. 387.

(633) Braithwaite's Case, 1 Vent. 19. S. C. 2 Keb. 488. R. v. Carlisle, 1 Str. 387. R. v. Amery, 1 T. R. 590.

the corporators or any of them, and that on such amoval the remainder of the Corporation shall elect others in their room, the terms of the charter preclude the supposition that the king can remove all at once, in as much as there must be a remainder left to exercise the power of election, but that the king may amove one or more, so he leave enough to form an elective assembly. This point was not necessary to the decision (and the case itself was overruled in the House of Lords), or I imagine the Court would not have attempted to introduce a doctrine so thoroughly unconstitutional, and so decisively contrary to precedents, that the only one which can be found in support of it occurred in the time of Charles the Second, and was afterwards mentioned in the Court with irony and reprobation.

634. The power of amotion does not pass by a grant of the power to elect as incidental to it, but must be expressly reposed in the select body by the charter. It has not been directly determined, but it was assumed by Lord Mansfield, that it may be transferred to a select body by a by-law in the same manner as the right of election.

Power not incidental to right of electing.

635. It was said that when the common council has the sole right of election and making by-laws there is some foundation for thinking that they possess the power of amoving those whom they elect, though claiming it neither incidentally nor by grant of the charter. I apprehend that when the Corporation is prescriptive, this is evidence for a jury to presume a custom if no-

When presumed in a select body.

(634) Bagg's Case, 11 Co. 99. a. S. C. 1 Rol. 225. R. v. Richardson, 1 Bar. 539. S. C. 2 Kenyon Ca. 119. Cowp. 502. R. v. Doncaster, 2 Ld. Ray. 1566. S. C. 1 Barnard. 265. R. v. Sadler, Styles, 477. R. v. Oxford, Palm. 452.

(635) R. v. Doncaster, 1 Barnard. 265.

thing contradictory appear; but in a Corporation by charter, surely such a power must be shown to have been expressly granted by the charter or a subsequent by-law, or at the utmost these facts should be left to a jury as evidence of a lost by-law.

II. WHEN THEY MAY AMOVE.

From what
office.

636. The amoval can be only from that office, against the duty of which the offence is committed; so that if the corporator hold more than one office, and misconduct himself in one, he can be removed from that only; and an amotion from the other is illegal; but if the offence be against the duty of both offices, the removal may be from both.

637. If a mayor or chamberlain have misapplied or embezzled the funds of the Corporation which are entrusted to him in that capacity, contrary to his duty of office, he may be amoved from it; but if at the same time he be an alderman or burgess, this cause is insufficient to authorize an amotion from the latter office, although a violation of his oath as mayor or chamberlain.

Second
amotion.

638. If one who has been irregularly amoved for good cause, be subsequently restored in obedience to a peremptory writ of mandamus, he may be again amoved for the original cause, in a more formal manner.

(637) *R. v. Chalke*, 1 *Ld. Ray.* 226. *S. C.* 5 *Mod.* 257. *R. v. Doncaster*, 2 *Ld. Ray.* 1566. *S. C.* 1 *Barnard.* 265.

(638) *Taylor v. Gloucester*, 3 *Bulstr.* 190. *R. v. Ipswich*, 2 *Ld. Ray.* 1283.

639. When the offence is against his duty as a corporator, but not a misdemeanor against the general law, he may be amoved by the Corporation or those in whom the power is vested, without any previous proceedings against him in the courts of law. When before conviction.

640. When the offence is against his duty as a corporator, and at the same time a misdemeanor against the law, it is not settled whether he may or may not be amoved, before he has been convicted in a court of justice: the argument against it is, that no court can entertain proceedings which would tend to prove a person guilty of such an offence, before he has been convicted by a jury, the only legal tribunal; both because it would be a prejudice against him on the trial, and because it may involve the inconsistency of a conviction in the court of the Corporation, and an acquittal before the Court of criminal judicature. Doubtful.

641. The Corporation had power to amove for any misdemeanor, expressly given by the charter, and they amoved a capital citizen for having given a bribe to a freeman, and offered him another, on condition of his voting for a particular person at the election for a mayor. The return showed an amoval for "the causes aforesaid"—an information "to the following effect"—that articles were exhibited against him to the effect in the information—and then set forth the offence as above, and the oath of the informer positively to the offence. Bribery.

(639) *R. v. Richardson*, 1 Bur. 539. *R. v. Liverpool*, 2 Bur. 732. *R. v. Derby*, C. T. H. 154.

(640) *R. v. Richardson*, 1 Bur. 538. *R. v. Liverpool*, 2 Bur. 732. *R. v. Derby*, C. T. H. 155.

(641) *R. v. Carlisle*, Fortesc. 200. S. C. 8 Mod. 20. 103. S. C. 11 Mod. 379. *R. v. Derby*, C. T. H. 155. *Dodwell v. Oxford*, 2 Vent. 34. *Chapman v. Wish*, Fitzgib. 155.

Although there might have been a previous conviction at law, yet being a great offence against the duty of his office, the Corporation have a jurisdiction, and may amove before a conviction by a jury, there being an express power to remove. This was the opinion of the whole Court, and the form of the return was considered sufficient.

But in the judgment given by Lord Hardwicke, in *R. v. Derby*, he refers to this case in the following terms: "Mandamus to restore a freeman of Carlisle, return that he corruptly gave money to one of the Corporation to vote for a mayor; and on that return the Court was equally divided: *Ld. Ch. J. Pratt*, and *Mr. Justice Powis*, held that a precedent conviction was necessary; but *Mr. Justice Eyre*, and *Mr. Justice*——(*Fortescue* I suppose) were of a contrary opinion, and they held, that for things which are merely offences at common law, a precedent conviction is necessary, because in such case the removal is solely on account of the party's infamy; but that for an action prejudicial to the Corporation, as well as contrary to the common law, the party might be disfranchised without a prior conviction; and so that case rested; so that it is hitherto quite unsettled." Lord Hardwicke appears to have mistaken the point on which the Court divided; for his observation is not borne out by the report cited in his judgment, but absolutely contradicted both by *Fortescue*, who says the whole Court was agreed on each point, and 8 *Mod.* 103. in which it is said that three judges held the amotion good, before conviction, against *Pratt C. J.* who stood alone, and that they were equally divided on the form of the return. Or it may be that his lordship had seen only the first argument of the case when the Court was so divided, though *Powis J.* after-

wards changed his opinion.—We have then a direct decision on this point, if we confide in Fortescue's report, who was himself one of the judges, by the unanimous opinion of the Court after argument and long consideration, and if we resort to the case in the Modern Report, by three judges against Pratt C.J. Yet the opinion to which Ld. Hardwicke C.J. seemed to incline, that there ought to be a previous conviction, is most consonant with reason: for the king cannot grant a Corporation any extraordinary power of trying such offences, so that the express grant avails nothing; for unless the Corporation has by the common law the right of investigating the corporators' conduct in these respects, it cannot be conferred by charter, for that would be an assuming to create a court with power to proceed in a manner different from the rules of common law, which cannot exist except by prescription or statute.

643. A burgess was amoved before conviction for criminally razing entries in the Corporation books, which were at first proper: this was held to be a misdemeanor as well as a breach of corporate duty, and Holt C. J. inclined that the amotion could not be supported, but the case was adjourned, and subsequently determined against the return upon another point.

Razing corporate books.

644. The amotion was for riotously assembling and assaulting several corporators, and thereby impeding the business of the Corporation, and held to be legal before conviction for the riot, because the offence is in its nature two-fold: the impeding of the corporate business, an offence against his duty, for which the amotion is sufficient; and the riot, which is but a circumstance

Hindering corporate business, although a riot.

(643) R. v. Chalke, Comb. 397. R. v. Derby, C. T. H. 155.

(644) Haddock's Ca. T. Ray. 439. R. v. Derby, C. T. H. 155, 156.

attending his breach of duty, for he might have been found not guilty, and acquitted of the riot upon an indictment, and still have been guilty of a breach of his duty; or he might have been guilty and convicted of the riot, and yet have been innocent of a breach of his duty to the Corporation, so that as an indictment would not have determined the matter, it had been vain and nugatory; and this is different from the case of Chalke, for there he could not have been guilty of the offence at law without at the same time having been guilty of a breach of his duty.

Attending
heterodox
meetings.

645. Under this class of offences must be ranked that of a mayor, who attends divine service with the insignia of office at any places of religious worship other than those of the established church.

Perjury,
forgery,
&c.

646. When the offence is not against his duty as a corporator, but indictable as a misdemeanor, and of so infamous a nature as to render him unfit for any public charge, as perjury or forgery, an officer cannot be amoved before he has been convicted by a jury, nor is such an amotion sustained by a subsequent conviction; but in as much as he may be immediately amoved again for these offences, I apprehend that a peremptory mandamus would not be granted to restore him after conviction.

Libel.

647. It was held that an amotion before conviction, for publishing a scandalous libel of the mayor, could

(645) V. Chap. V. Sec. II.

(646) R. v. Richardson, 1 Bur. 538. R. v. Liverpool, 2 Bur. 732. R. v. Derby, C.T.H. 154, 155. R. v. Chalke, Comb. 397. R. v. Lane, 2 Ld. Ray. 1304. S. C. Fortesc. 275. S. C. 11 Mod. 270.

(647) R. v. Lane, 2 Ld. Ray. 1304. S. C. Fortesc. 275. S. C. 11 Mod. 270. R. v. Derby, C.T.H. 155.

not be sustained. I imagine that an amotion for this offence could not be supported after conviction; for though a misdemeanor—the offence of writing a libel on a person and sending it to him, is not an infamous offence, nor has a libel on a mayor, written by a corporator, any thing of the crime of læsæ majestatis or peculiar guilt.

III. FOR WHAT CAUSE.

648. Sarjeant Hawkins said, that though a private office is not forfeited without some special damage, a public office is forfeited by mere non-user. But it was held by Lord Hardwicke and Page J. that this is not the law, and that it was determined in Whitacre's case, that a public office is not forfeited by mere non-user, unless some special damage ensue, any more than one of a private nature. Non-user.

This division resolves itself into two parts: the first showing what causes are sufficient; the second what causes, having been relied upon, were held to be insufficient.

(1.) *Sufficient Cause.*

649. A mere ministerial officer appointed durante bene placito, may be amoved without any other cause, than that the pleasure of those who appointed him is determined, and it is unnecessary to resort to notice, and a formal amotion for the appointment of another to the office is sufficient. In these cases, of course, the right to amove is incidental to the right of appointment. At pleasure.

650. And he may be so amoved when appointed *durante bene placito*, where the power of appointment is "for life or during pleasure." Of this class is a town clerk or recorder, that is, it seems, where the recorder is a mere counsel to advise, and not one who has a corporate office and voice in the common council.

Common-council-men eligible at pleasure.

651. There may be a custom to elect common-council-men *ad libitum*, and to remove them at pleasure, for they have not necessarily a franchise in the office, but their distinction is collateral to the Corporation, being freemen appointed by the other freemen to act for them according to the terms of the custom.

652. Or the charter may render common-council-men so amoveable, as is the case where it empowers to remove them *per discretiones suas toties quoties et quandounque illis placuerit*.

Aldermen.

653. But there cannot be a custom to amove at pleasure from an office of the essence of the Corporation, such as an alderman or jurat, for these have a franchise in their office and each as much title as another, so that such a power of amotion would tend to aid party intrigues and dissolve the Corporation. And it is wholly unimportant that there be a custom to elect such

(650) *Dighton's Case*, T. Ray. 188. S. C. 1 Vent. 77. 82. S. C. R. v. Stratford on Avon, 1 Lev. 291. R. v. Thame, 1 Str. 115. *Middleton's Case*, Dier, 332. b. n. *Pepis Ca.* 1 Vent. 342. R. v. Cambridge, 2 Show. 70. R. v. Canterbury, 11 Mod. 403. S. C. 1 Str. 674.

(651) *Warren's Case*, Dier, 332. b. n. R. v. Coventry, 1 Ld. Ray. 391. S. C. Salk. 430. R. v. Chester, 5 Mod. 11.

(652) R. v. Coventry, 1 Ld. Ray. 392. S. C. Salk. 430. R. v. Andover, 1 Ld. Ray. 710.

(653) *Warren's Case*, Dier, 332. b. n. Anonymous, 1 Lev. 148. *Dighton's Case*, 1 Vent. 77. 82. S. C. 1 Sid. 461.

officers "during pleasure," or to elect them "during life if it appear to them expedient," and that it is alleged that they deemed it expedient to amove them. If such a clause be contained in a charter it is absolutely void.

654. But a custom was alleged for the mayor and major part of the Corporation to turn out whom they pleased. On which Holt C.J. observed that there was no remedy for it, the constitution being so.

The following have been held sufficient causes for turning out such officers as are not amoveable at pleasure, on account of a dereliction of their corporate duty.

655. Non residence, having deserted the borough and resided at a considerable distance for the last four years continuously, by reason of which he has neglected to attend the business of the Corporation, although it do not appear that any special damage has arisen to the body from his absence, or that the charter required residence.

Non-residence.

656. Having deserted his habitation in the city for the space of three years, and been forty times absent from the corporate meetings after general notice, although his presence was not absolutely necessary, is sufficient cause for amoving an alderman; for it is incident to his duty and place, to be resident where he is chosen, his very name imports it, and such absence renders him incapable of doing his duty where he ought;

(654) *R. v. Andover*, 12 Mod. 665.

(655) *R. v. Doncaster*, Say. 39. *R. v. Trueboy*, 11 Mod. 75. S. C. 2 *Ld. Ray.* 1275. *R. v. Lime Regis*, Doug. 153.

(656) *Exeter v. Glyde*, 4 Mod. 36. S. C. Comb. 197. *Vaughan v. Lewis*, Carth. 229.

his is not a place of profit, but of freedom and government of the city, and every alderman ought to be a citizen and inhabitant of the city, where he is an alderman, and if he remove he ceases to be a citizen; but he may continue to be a freeman, though he want that qualification which enables him to be an alderman.

657. Non-residence which has caused a neglect of duty, by which some person is injured in his corporate franchise, is cause for amoving an alderman; but unless residence be required by the charter, it is sufficient that the corporator at reasonable times attend to the corporate business, although he reside at some distance from the town.

Neglect of
attendance.

658. Non attendance at several corporate meetings after having received proper notice, if by reason of his neglect the business of the Corporation have been impeded, is sufficient cause for amoving a recorder.

659. So is the temporary absence and a less frequent non-attendance of an officer, whose duty calls upon him to be constantly present, such as a mayor

660. Continued absence of about five years, and general neglect of attending when courts are to be held before the mayor, aldermen and recorder, or two of them, is sufficient cause for amoving a recorder, although no particular mischief has arisen to the Corporation from his neglect. Semb.

(657) *R. v. Portsmouth*, 3 B. C. 156. S. C. 4 D. R. 775. *R. v. Trueboy*, 11 Mod. 75.

(658) 1 Hawk. P. C. 166. s. 1. *R. v. Wells*, 4 Bur. 2004. Lord Bruce's Case, 2 Str. 819. et notis. *R. v. Ipswich*, 2 Ld. Ray. 1233. S. C. Salk. 443.

(659) 3 Atk. 184. Case 56. Bul. N. P. 206, 7.

(660) Lord Hawley's Case, 1 Vent. 145.

661. So is non-attendance at one corporate meeting, appointed by himself where his presence is proper, though not absolutely necessary, he being in the neighbourhood and able to attend, although he did not receive notice at the time of the meeting.—But it may be observed, that other charges were brought against this recorder.

662. So is ignorance of the law, manifested by particular acts, as formerly by trying an accessory before the principal, or denying benefit of clergy to one convicted of bigamy. But a general averment of ignorance of the law, cannot be sustained. Semb.

663. Not accounting for rents by him received in his official capacity, and charging for payments never made, is a sufficient cause for amoving a chamberlain; but it ought to appear that he has been called upon to account. Not accounting.

664. Razing of genuine and true entries in the public books, to falsify them and injure the Corporation; but a general allegation that he razed or altered the books is insufficient, for the rasure or alteration may have been to correct an entry originally erroneous. Razing books.

665. Being so poor as not to be capable of paying the taxes for which he is liable in the municipality, is sufficient cause for amoving an alderman. Poverty.

(661) *R. v. Ipswich*, 2 Ld. Ray. 1237. *R. v. Wells*, 4 Bur. 2004. 1 Hawk. P. C. 66. s. 11.

(662) Lord Hawley's Ca. 1 Vent. 146.

(663) *R. v. Doncaster*, 2 Ld. Ray. 1566. S. C. 1 Barnard. 265. *sed vide R. v. Chalke*, 1 Ld. Ray. 226.

(664) *R. v. Chalke*, 5 Mod. 257. S. C. 1 Ld. Ray. 226. V. tit.

(665) *R. v. Andover*, 3 Salk. 229.

Drunken-
ness.

666. Habitual drunkenness is cause for amoving an alderman, on account of the evil example to others, and his consequent insufficiency to discharge the duties of a magistrate.

Disturbing
corporate
business.

667. Disturbing the election of the mayor, or preventing corporators from assembling and proceeding in their business in the corporate assembly, although attended with riotous conduct, and the amotion may be before a conviction for the riot.

Bribery.

668. Bribing a corporator to vote for a particular candidate to fill an office in the Corporation, such as that of mayor, or to vote for a candidate at the election of members of parliament, but there should be a previous conviction by a jury.

(2.) *Insufficient Cause.*

The causes which will be now enumerated are such as having been relied upon in returns of an amotion, were held by the Court to be insufficient.

Original
disqualifi-
cation.

669. That which only disqualified the person to be elected, although it made the election voidable ab initio, is insufficient; for one so disqualified is not in law a corporate officer, and therefore cannot be amoved by the Corporation, but must be ousted by proceedings

(666) R. v. Taylor, 3 Salk. 231. Taylor v. Gloucester, 1 Rol. 409. S. C. 3 Bulstr. 190.

(667) Haddock's Case, T. Ray. 439. R. v. Derby, C. T. H. 155. V. tit. 644.

(668) R. v. Tiverton, 8 Mod. 186. R. v. Derby, C. T. H. 155. V. tit. 641.

(669) R. v. Doncaster, Say. 40. R. v. Miles, B. N. P. 203. R. v. Lime Regis, Doug. 85. Symmers v. Regem, Cowp. 502. V. tit. 728. et seq.

in quo warranto. Of this nature is non residence, when required only as a qualification before election, or any irregularity in the election or admission.—And if a corporator so disqualified or illegally coming into office, have held it undisturbed for six years, being protected by the statute against an ouster in quo warranto, he cannot be amoved by the Corporation declaring his office originally void on this account, but he has acquired an indisputable title.

670. But if non residence be not only a disqualification antecedently to the election, but residence is required as a continuing qualification during the possession of office, there is no reason for preventing an amotion for the subsequent offence, though the amoving body have precluded themselves from disputing his original title, either by concurring in his election, or his subsequent official acts, for as against them he is a legal officer.

Continuing cause.

671. Non-residence is not a sufficient cause of amotion, unless residence be required by the charter, or the non-residence be attended with some special injury to the Corporation or municipality. If the charter impose a penalty upon a mayor or other officer for not residing, unless it give also a power of amoving him for the offence, it restrains the punishment to the penalty and does not warrant an amotion.

Non-residence, when.

672. Departure from the borough and its liberties with his family, about five months before, and not hav-

(670) R. v. Miles, B. N. P. 203.

(671) R. v. Williams, 2 M. S. 144.

(672) R. v. Leicester, 4 Bur. 2087.

ing returned at the time of the amotion, is not sufficient to warrant it, unless a special damage have been caused to the borough, by such absence.

Neglect of
corporate
assemblies.

673. Residing two or three miles from the borough, and non-attendance at a meeting of the common council, is not of itself a sufficient cause; for it is not the imperative duty of a common-council-man to attend every assembly, and his conduct is not to be impeached if he render a general attendance in his place.

674. Absence of a portman from four occasional great meetings, one of which was on the charter day, he having received ordinary but no particular notice, when it does not appear that any necessary business was by that means impeded, is not sufficient cause.

675. Nor is absence of a recorder from a corporate meeting, not having received a special notice that his appearance was necessary, and the Corporation having received no public inconvenience from his absence.

676. Non-attendance of a burgess at the sessions where his presence is not necessary, so that he attend so often that by a similar regularity of attendance in the others, the corporate business would not be neglected.

677. Or saying that he would come no more among them, unless followed by generally absenting himself :

(673) R. v. Doncaster, Say. 39.

(674) R. v. Richardson, 1 Bur, 540. S. C. 2 Kenyon Ca. 120.

(675) R. v. Wells, 4 Bur. 2003.

(676) R. v. Pomfret, 10 Mod. 108.

(677) R. v. Exeter, Comb. 197.

this is rather a question of a tender of resignation, and such a declaration in general terms, although accepted, does not amount to a resignation.

678. Age is no sufficient cause for removing an alderman, but rather an honor. Age.

679. Razing entries in the Corporation books, unless it be shown that they were originally correct, and that the rasure was mischievous, or to falsify them, is an insufficient cause. Razure of books.

680. It is insufficient cause for amoving an alderman, that he used insulting words to the mayor in common council, as saying that he was a base fellow or a fool;—or for removing a common-council-man for saying of an alderman that he was a knave; nor is writing a libel on the mayor, a sufficient cause; for personal offences from one member to another are to be punished according to law, and not by the Corporation. Personal insults.

681. Bankruptcy and not having obtained his certificate, or insolvency, is not a sufficient cause of amoving from the office of alderman or any other office, when the possessor has not the receipt and management of the public funds. Bankruptcy, &c.

682. Refusal to deliver over the Corporation books entrusted to his custody as the proper officer to per- Detaining books.

(678) *Hazard's Case*, 2 Rol. 11.

(679) *R. v. Chalke*, 1 Ld. Ray. 226. S. C. 5 Mod. 259.

(680) *R. v. Oxford*, Palm. 455. 2 Salk. 428. *Jay's Ca.* 1 Vent. 302. *Bagg's Ca.* 1 Rol. 224. S. C. 11 Co. 99. *Earle's Ca.* Carth. 174. S. C. B. N. P. 203. *R. v. Lane*, Fortesc. 275. S. C. 11 Mod. 270.

(681) *R. v. Liverpool*, 2 Bur. 732. 735.

(682) *Anon.* 1 Barnard. 402. *R. v. Ipswich*, 2 Ld. Ray. 1238. *R. v. Ingram*, 1 W. B. 50.

sons applying to receive them with an order from the Corporation; for they may be consulted in his hands, or detain would lie for them, if the Corporation had a right to compel the delivery; or a mandamus.

Suing contrary to by-law.

683. Suing another in courts out of the municipality or refusing to abide the arbitration of two corporators appointed by the Corporation, contrary to the restraint of a by-law, is not sufficient cause of amotion.

Refusing to pay fees, &c.

684. Refusing to pay the usual fee on admission to the livery, or his share towards the expence of renewing the charter, are not causes of amotion, but the proper subjects of a by-law which the body has power to make for enforcing such payments when reasonable.

Misemployment of corporate money.

685. Misemployment of the corporate funds in his custody, when it is the proper subject of an action; but this appears to be a good cause of suspension from a financial office, for the Court will not grant a mandamus to restore until the accounts are made up, and submitted to the Corporation.

Revealing counsels.

686. Revealing the private counsels of the Corporation was held insufficient; but that was from the generality of the allegation, and omission in showing what were the counsels revealed.

Casual intoxication.

687. Casual intoxication is not a sufficient cause of removing an alderman, for this is likely to happen to the best of them.

(683) Middleton's Case, Dier, 333. a.

(684) Taverner's Case, T. Ray. 446. 1 Sid. 282.

(685) R. v. Chalke, 1 Ld. Ray. 226. S. C. 5 Mod. 259. R. v. Mayor of London, 2 T. R. 182.

(686) Bagg's Case, 1 Rol. 224.

(687) R. v. Taylor, 3 Salk. 231.

688. Refusa to advise the mayor or aldermen in their several capacity, is no good cause for amoving a recorder, his duty being merely to advise the Corporation as a body politic, or in their judicial capacity. And if it appear that the oath which he has taken on entering upon his office, requires him to advise them in their several capacity, on certain subjects, his refusal so to advise on other topics, is an insufficient reason for amoving him.

Refusing
legal ad-
vice.

689. So is a recorder's having given advice, and acted contrary to the mayor's opinion and direction, in continuing an elective assembly of members of parliament, and administering oaths after the departure of the mayor, who is the returning officer; although this is contrary to law, for this is not a corporate assembly, and the recorder's is no offence against his corporate office.

Advising
contrary to
directions
of mayor.

690. Nor is it sufficient cause for removing a corporate officer, that he hindered the gathering of tolls claimed by the Corporation, by menacing the toll gatherer, and persuading the owners of the goods charged not to pay, particularly where it appears that there is some uncertainty concerning the title, for it is only disputing the legality of the demand for which the Corporation has its remedy if injured. It was said in Bagg's case, that dissuading the owners from paying a custom called wine wight was an insufficient cause of amotion as alleged, but that it would have been sufficient, if any special injury had been shown to have

Advising
not to pay
customs,
&c. to Cor-
poration.

(688) R. v. Ipswich, 2 Ld. Ray. 1238.

(689) R. v. Wells, 4 Bur. 2003.

(690) R. v. Vicars, 11 Mod. 214. Bagg's Case, 1 Rol. 224. S. C. 11 Co. 97. b. 98. b.

arisen to the Corporation from his interference, for that it is against the corporator's duty and oath, which are to maintain the privileges of the town.

IV. IN WHAT FORM.

Amoving
assembly,
&c.

691. To constitute a legal amotion, it is necessary that the corporator receive notice to appear; that an assembly of those who have power to amove convene; that the proceedings be conducted in such a manner that he have a fair opportunity of defending himself; and that he be convicted of the offence and amoved.

Notice to
accused.

692. A personal notice must be served upon the accused a reasonable time before the amotion: in one case it was held that notice on the same day was sufficient, but in that case it seems that he appeared to defend himself against the charge. And where an amotion is shown, the notice must be particularly averred and positively; if it be under a recital, as licet summonitus fuit, it is insufficient.

Parol.

693. The notice of the day may be well enough given by the officer by word of mouth.

Particular
charges.

694. It does not appear necessary that the summons should particularize the charges, but that some intimation of them ought to be given, that the accused may

(692) *R. v. Richardson*, 1 Bur. 540. *R. v. Liverpool*, 2 Bur. 731. *Bagg's Case*, 11 Rep. 99. a.

(693) *R. v. Ipswich*, 2 Ld. Ray. 1240.

(694) *R. v. Corp. of Wilton*, 5 Mod. 259. *R. v. Liverpool*, 2 Bur. 734, 5. *Exeter v. Glyde*, 4 Mod. 37. *R. v. Ipswich*, 2 Ld. Ray. 1240.

have an opportunity of vindicating himself. In the case of Glyde it was said, that there should be a notice of the charge, and that it was not sufficient to summon him generally, and then to allege particular crimes against him which he may not be prepared to answer. And it seemed to be the opinion in the case of Whitaker, that if the notice set forth one charge, and a different were preferred at the time of trial, the accused might decline answering the new matter, and that an amotion grounded on such new charge would be void.

695. In two cases this notice is dispensed with: the first is, where the party has appeared at the Court, and either defended himself or confessed the charge against him; for this is a waiver of his right to notice.

Notice dispensed with by appearance.

696. The second is where the corporator has left the borough and resided constantly elsewhere, with his family; for it amounts to a desertion of the place, and abdication of his office, therefore no notice either personal or general to come and defend himself against the charge is necessary; but it seems that if he have subsequently returned and be in the place at the time of the amotion, a notice ought to be given as in other cases; for though the return does not cure the preceding absence, he cannot be presumed to have abandoned the borough, and may be able to show a sufficient excuse for his absence.

By abandonment of the borough.

(695) *R. v. Wilton*, 2 Salk. 428. *R. v. Ipswich*, 2 Ld. Ray. 1240. *R. v. Feversham*, 8 T. R. 356.

(696) *R. v. Shrewsbury*, 7 Mod. 202. S. C. 4 Bro. P. C. 271. *Glyde v. Exeter*, 4 Mod. 37. S. C. 1 Show. 258. 364. S. C. *R. v. Exeter*, Comb. 197. *R. v. Shrewsbury*, C. T. H. 151. *R. v. Trueboy*, 2 Ld. Ray. 1275. S. C. 11 Mod. 75. *R. v. Lime Regis*, Doug. 144. 149. *R. v. Grimes*, 5 Bur. 2600. Sed vide *R. v. Portsmouth*, 4 D. R. 775. S. C. 3 B. C. 156.

697. But one who has left the municipality and resided elsewhere for five months, is entitled to notice to come and defend himself; for this can by no construction be construed an abandonment of the borough, although the corporator may have expressed an intention of continuing to reside elsewhere; for he may alter his mind and return within a reasonable time, unless his absence have caused injury to the Corporation by his neglect of duty, or perhaps the charter expressly require residence.

Assembly. 698. The body who amove must be convened in a corporate or select assembly, according to the rules laid down under that title. And if the mayor and aldermen be assembled as part of the common council, they cannot proceed to an amotion in the character of mayor and aldermen; for when so convened they can only do such business as they are empowered to transact in the character of the common council. And in the return of an amotion by the common council, it must be averred to have been made by them in common council assembled, and not merely at an assembly held in the common-council house.

Charge. 699. The charge against the accused must be alleged with substantial certainty, but technical precision is not required; for this reason an allegation, that he forged or caused to be forged is sufficient, although it were not sufficient in an indictment, on account of the alternative.

(697) *R. v. Leicester*, 4 Bur. 2089.

(698) *R. v. Sandys*, 2 Barnard. 301. *Taylor v. Gloucester*, 1 Rol. 409. S. C. 3 Bulstr. 190. Vide Chap. I. sect. iv,

(699) *R. v. Lime Regis*, Doug. 174.

700. The officer must have an opportunity afforded him of answering the charges preferred against him, and making a full defence. Defence.

701. If a charge insufficient in itself be alleged against an officer or one that cannot be sustained, the amotion is not legal, although he confess a sufficient offence; as if a recorder be accused of neglecting to hold a sessions of oyer and terminer and gaol delivery, and he confess an omission to hold a sessions of the peace, his answer is irrelevant to the charge, and an amotion for the offence confessed is not sustainable, because of the erroneous accusation. Offence proved.

702. If the officer remain silent, and do not deny the charge, it must be examined and proved, and all proceedings must be conducted as though he had denied it; for an amotion on pretence that his silence amounts to a confession is void, but not sufficient ground for an action against those who disfranchise him unless malice be shown.

703. As to form in amoving a ministerial officer elected during pleasure, very little is necessary, for he is not entitled to any notice; and a summons to those who have a power of amoving him to convene and elect another is sufficient, without a summons to convene to amove him from office; and if they do elect another, this is of itself an amotion of the former without a previous declaration that he is amoved, for they are presumed Ministerial officer, &c.

(700) *Bagg's Ca.* 1 Rol. 225. S. C. 11 Co. 99. a.

(701) *R. v. Ipswich*, 2 Ld. Ray. 1240.

(702) *R. v. Feversham*, 8 T. R. 356. *Harman v. Tappenden*, 1 East. 562.

(703) *R. v. Canterbury*, 11 Mod. 403. S. C. 1 Str. 674. *R. v. Thame*, 1 Str. 115. *R. v. Taunton*, Cowp. 413. *R. v. Pateman*, 2 T. R. 777.

to understand what is the legal effect of such an election; and therefore the argument, that perhaps those who voted for the new officer, apprehending that they were electing him into a vacancy, would not have voted for an amotion of his predecessor, is of no weight. Of similar effect is an election to an incompatible office with acceptance by the person elected; they are all presumed to know that such an election is a determination of the former.

V. EFFECT OF AN AMOTION.

704. A legal amotion does not invalidate any act which the corporator has previously done or in which he has concurred, but from that moment he ipso facto ceases to be a corporator, and another may be elected into the vacant place. If the person amoved continue to act as a corporator he is a mere usurper without color of title, unless it be acquired by length of time: he may be ousted in quo warranto and punished for the usurpation; and all corporate acts in which he has concurred are equally void, as though he had never been elected or admitted. But it is necessary to observe that an amotion from one office does not in the least impair the corporator's title to another, much less is it a disfranchisement from his right, as a mere member of the Corporation.

VI. RESTORATION.

When and
by what
means.

705. When a corporator has been excluded from participating in corporate business, in which he has a right

to act, under pretence of an amotion or suspension, which is a temporary amotion, he is entitled to a writ of restoration, to which the Court will compel obedience, unless it be shown that the amotion relied upon was legal. On this more will be said in treating of the mandamus to restore.

706. The duty of restoring one who has been improperly amoved, belongs to that body however constituted, which has attempted the amoval. In fact a restoration is merely an abstaining, on the part of the amoving body, from opposing the right of the corporator to transact the duties and enjoy the franchises appertaining to his office. It was said by Coke C. J. that the writ ought to be directed to the municipality in their corporate name, and not to the amoving body; but it appears that a direction in either manner is sufficient. By whom.

707. The effect of a restoration is not to create the Effect. person an officer de novo, and give him a new title, but it replaces him in exactly the same situation in which he stood before the attempted amoval. For this reason all corporate acts in which he has concurred between the moment of his removal and restitution are of equal validity as if he had never been amoved: if he were before a legal officer, such acts are legal, if he were only an officer de facto, his acts before his amoval, during the amotion, and subsequently to the restoration are equally voidable, and he may be ousted in quo warranto for any defect in his original title. If he

(706) *Taylor v. Gloucester*, 1 Rol. 409. S. C. 3 Bulstr. 190. Holt's Ca. Freem. 441. notis. V. Mandamus, Direction.

(707) *Symmers v. Regem*, Cowp. 503. R. v. Ipswich, 2 Ld. Ray. 1283. S. C. Salk. 448. 3 Salk. 231. *Taylor v. Gloucester*, 3 Bulstr. 190.

were originally a legal officer and amoved for sufficient cause, but restored on account of informality in the amotion, all his corporate acts both before and since the removal are valid, as though he had continued in the entire and undisturbed fruition of the office; but he may be again amoved in a more formal manner, which vacates his office from the time of the second amotion, but has no retrospective effect upon the former irregular amotion.

Void amotion does not affect title.

708. Indeed, if the amotion were voidable, on account of an insufficient cause or insufficiency in the form by which it was effected, the person continues a corporator to all intents and purposes; and if he is treated by the rest as an officer, and continues to act in and enjoy the franchises of his office, there is no need of a writ of restoration. For if on an information in quo warranto against him for usurpation subsequent to such an amotion, he either show his original title, or that be admitted by the pleadings, it is incumbent on the prosecutor to show the sufficiency and formality of the amotion, and the same must appear when his title is collaterally impeached for the purpose of invalidating corporate acts in which he has concurred.

SECTION IV.

DISFRANCHISEMENT.

The distinction between amotion and disfranchisement has not been at all times sufficiently regarded, but it is very material. Amotion applies only to officers, and causes a cessation of the particular offices from which they are amoved, but in no manner affects their right to the freedom of the municipality. Disfranchisement is applicable only to the freedom, and

of course affects some officers, yet not quasi officers, but quasi freemen. If therefore, the officer must as a necessary continuing qualification be a freeman, a disfranchisement ipso facto determines his office, but if the office require no such qualification, a stranger being equally eligible with a corporator, the disfranchisement in no degree impairs his title to the office. Therefore if a common-council-man be amoved, he still continues to be a freeman, and if a recorder where the recorder is eligible from among strangers as well as corporators, happening to have been a corporator, be disfranchised, he still continues to hold his office of recorder.

709. It appears that there is *not* an incidental right in Corporations to disfranchise their members, but it must be claimed by prescription or express grant of the charter. This was the rule laid down in the first case upon the subject, and it has never been expressly overruled, the cases in which it has been questioned being questions of amotion.

710. The law relative to disfranchisement is not well ascertained, and is for that reason more open to observation than that relating to amotion. I apprehend that some of Sir E. Coke's remarks on this subject are worthy of considerable attention, although they have been frequently looked upon as overruled. At the time when James Bagg's case was before the Court, their attention had been rarely attracted to the consideration

(709) Bagg's Ca. 1 Rol. 225. S. C. 11 Rep. 99. a. Style, 478.

(710) Bagg's Ca. 11 Co. 99. S. C. 1 Rol. 224. *The Protector v. Kingston*, Styles, 480. Lord Bruce's Case, 2 Str. 820. *R. v. Oxford*, Palm. 454. *R. v. Richardson*, 1 Bur. 525. S. C. 2 Kenyon, 91. *R. v. Doncaster*, 2 Ld. Ray. 1566. T. T. 25 & 26 Geo. II. *R. v. Doncaster*, Say. 38. *Symmers v. Regem*, Cowp. 503, 4, 6. *R. v. Lime Regis*, Doug. 154.

of corporate causes, and the distinction between the right to the offices and the right to the freedom of a municipality had been little considered. The particular case was of amotion from office; the arguments were in general more applicable to disfranchisement. But there is a material difference in principle. The enjoyment of office is not for the private benefit of the corporator, but an honorable distinction which he holds for the welfare of the Corporation, and therefore although it be an office of a freehold nature, it is entirely conditional; in the first place depending on the particular regulations of the constitution, such as residence, &c.; secondly, upon his discharge of those duties which belong to the office, neglect of which is cause of amotion; thirdly, on his being such a person as ought to be permitted to hold office, and therefore defeated by commission of any infamous offence, although not relating to the Corporation. But the franchise of a freeman is wholly for his own benefit, and a private right; a right in the municipality similar to that of a natural subject in the state, of which he ought not to be deprived for any minor offence against his corporate fealty than that for which as a subject he ought to be deprived of his franchise as a liegeman. For this reason all minor corporate offences, such as improper behaviour to his fellow-corporators, where not punishable by the general law of the land, as well as violations of his corporate duties, ought to be punished by penalties imposed by the ordinances of the municipality, and not by disfranchisement. But such offences against the general law, as occasion a forfeiture of all civil rights, import in themselves a forfeiture of the corporate franchise; and offences against the Corporation, which tend to its destruction, such as defacing the charters, altering the corporate records so as to destroy the evidence of their title to privileges, or

that of the title of his fellow-corporators to their franchises are of course causes of disfranchisement. If the charter require residence or any other subsisting qualification, of course the freedom being in itself conditional, the right determines upon cessation of that qualification. This has been improperly compared to a condition on which an estate is voidable; it should be rather compared to a limitation depending upon the continuance of some collateral circumstance, for if residence be required as a continuing qualification, it is an ingredient necessary in the character of the person who may enjoy the freedom, and not a mere condition for the benefit of another, of which he may take advantage or which he may wave at his pleasure. The common law points out a space of time sufficiently definite to prevent any difficulty arising from regarding non residence as a cesser of title in a freeman. If one neglected to make continual claim for a year and a day, he lost his entry, or if he neglected to claim an estray, or, according to our ancient law, if a lord neglected to retake his villein, who had fled and resided in a borough for that time, his right was gone; and many other instances might be adduced, in which the common law regards a year and a day as a cesser of title, and a space of time sufficiently definite to avoid all difficulty as to what did or did not amount to a sufficient neglect to alter an existing right.

711. Few cases have ascertained what is sufficient cause of disfranchisement; those which have been decided on this point, are almost all of the negative kind, showing only what causes being relied upon were considered insufficient to warrant a disfranchisement.

712. A corporate assembly was convened by the bailiffs, who, apprehensive of a riot from the violence of the different parties, having adjourned the Court, and gone away with their party, the opposite party stayed in the town hall, saying that the Court was not dissolved, and declaring themselves a Court thereupon made divers orders or acts of Court and caused them to be entered in the court book, where all the orders used to be entered. This conduct was held to be sufficient cause for disfranchising the party who remained and concurred in such acts; for it was no court, and the entry of such orders is very prejudicial to the Corporation and to the ill example of others to disturb the government.

Poverty.

713. Being so poor as to be incapable of paying his scot and lot was held insufficient. So was a conviction of an assault, or saying of an alderman that he was a knave; or writing a libel or scurrilous letter concerning an alderman. For the first is a misfortune and not an injury to the Corporation as such; and the other offences mentioned are punishable at common law by fine or imprisonment upon conviction by a jury, and not fit subjects for the investigation of a corporate body.

Assault.

Libel, &c.

Slander.

714. It was said by Twisden C.J. that a freeman may be disfranchised for saying of the mayor that he had burnt the charters of the Corporation; but the observation was gratuitous and immaterial to the

(712) *The Protector v. Kingston*, Sty. 478. 480.

(713) *R. v. Andover*, 3 Salk. 229. *Jay's Case*, 1 Vent. 302. *Earle's Case*, Carth. 174. b. *R. v. Oxford*, Palm. 455. *R. v. London*, 2 Lev. 201. *R. v. Lane*, 11 Mod. 270.

(714) *Jay's Case*, 1 Vent. 302.

decision ; besides, the charge may be true, and if so the corporator has a right to prove it against the mayor.

715. Even a usage in a prescriptive Corporation to disfranchise or to suspend a freeman for insulting words to an alderman a principal officer of the Corporation is void, although the customs have been in general terms confirmed by a statute. Custom for slander.

716. Misconduct in a corporate office warrants only an amotion from that particular office in which the person has misconducted himself, and does not justify an exclusion from the freedom. Cause of amotion is not cause of disfranchisement.

717. It was resolved that the cause of disfranchisement ought to be grounded upon an act, which is against the duty of a citizen or burgess and to the prejudice of the public good of the city or borough, and against his oath which he took when he was sworn a freeman, for it is a condition of law tacitly annexed to his freedom or liberty. But a mere attempt to do such an act, unattended with any eventual injury to the municipality, is not a sufficient cause, for a freeman has a freehold in the franchise for his life. Attempt to do an improper act.

718. If the party grieved by an illegal disfranchisement be for the causes of his disfranchisement committed to prison, or if his shop be shut up, or if he be Remedy for illegal disfranchisement.

(715) R. v. London, 2 Lev. 201. R. v. Rogers, 2 Ld. Ray. 777. R. v. Guildford, 1 Lev. 162.

(716) R. v. Doncaster, 2 Ld. Ray. 1566. V. tit. 636.

(717) Bagg's Case, 11 Rep. 98.

(718) Bagg's Case, 11 Co. 99, b.

removed with force from the corporate assembly, he may have an action of false imprisonment, or trespass, or assault and battery, and in such action the causes of the disfranchisement may be pleaded and examined.

CHAPTER V.

CORPORATORS.

THIS chapter treats of the title, offices, privileges, and duties of Corporators, both officers and freemen, in their relative situation as members of the same body politic, and is divided into two sections.

I. Title of Corporators.

II. Their powers, privileges, duties, acts, &c.

SECTION I.

TITLE OF CORPORATORS.

719. The first section shows how the title is consummated, how investigated, how confirmed, and what is its duration.

I. HOW CONSUMMATED.

720. The title of a corporator or corporate officer is acquired by election, appointment or inchoate right, conferred on certain classes of persons as before has been observed, and it is consummated by admission

to the enjoyment of the freedom or office. This admission, whether made in ordinary course or in obedience to a writ of mandamus, does not in the least strengthen the original title or confer any new right: its operation is merely to give the person the legal possession of the office, which he must maintain upon the strength of his prior title.

By the
charter.

721. The charter provides, that if the mayor die within the year after his election and swearing in, the alderman first in order after the mayor so dying, who shall be in the borough during the vacancy of such mayor, shall officiate as mayor, and so from time to time as often as the case shall happen. In this case the right of the senior alderman to officiate is confined to the particular circumstance of the mayor's death "within the year after his election," and if the mayor hold over his year and then die, the senior alderman is not warranted by this provision to officiate as mayor until a successor is chosen.

722. If the charter declare that the common-council-men shall be elected out of the burgesses (freemen), and name among the first common-council-men, persons who are not burgesses, they are by such nomination constituted burgesses and freemen, but this arises from the acceptance of the charter, because that is equivalent to an election by those who are already freemen; but the king cannot by his letters patent create an individual a freeman of a municipality already incorporated.

(721) R. v. W. Smith, 2 M. S. 584. 598.

(722) 4 D. R. 429. City of London's Case, 8 Co. 126. b.

723. If the officer be created by patent, he is immediately in his office by force of the patent without any admission or investiture. Possession of office.

724. There are some offices which the person may possess before he is sworn ; but these are not of a corporate character, to which an admission is indispensable.

725. It has been already said, that when the proper persons have refused to admit one entitled, a mandamus will be granted to compel them to do so. This relates only to public offices and franchises; yet all corporate rights are of that nature, and although there may be persons holding offices under the Corporation which are of a private nature, and for which a mandamus will not be granted, these cannot be called in strictness corporate offices. To prove his title to a private office, if it be of a freehold character, an assize may be brought by the claimant, in which he must show a seisin. If it be an office of profit he has his remedy by an action on the case against the usurper for the profits, or assumpsit for money had and received to his use, in which the fees and mean profits may be recovered but not the office itself; and to maintain these personal actions, it is not necessary for the plaintiff to show that he was ever seised. Remedy to obtain office.

726. The mandamus gives a legal not an actual possession, and the person admitted under the writ is left Effect of a mandamus.

(723) *Craig v. Norfolk*, 1 Mod. 122.

(724) *Id. ibid.*

(725) *Craig v. Norfolk*, 1 Mod. 122. *R. v. Westminster*, Comb. 244. *R. v. Jotham*, 3 T. R. 578. *R. v. Whitstable*, 7 East, 356.

(726) *R. v. Dean and Chap. of Dublin*, 1 Str. 538. *Basset v. Barnstaple*, Sid. 286. *R. v. Norwich*, 2 Ld. Ray. 1215. *R. v. Jotham*, 3 T. R. 577. *R. v. Clarke*, 2 East, 83. *V. Mandamus to admit.*

to get an actual possession as he can ; but when he has the legal possession, he is by law as much entitled to every privilege belonging to the office as if he had the actual possession, and may maintain his right without the assistance of the Court, even against another who is already in possession. If two persons claim a title to the same office, each, on showing a *prima facie* title, has an equal right to a *mandamus*, and the writs may be executed on behalf of both : when they come together, he who has the legal possession may maintain his right against any disturbances ; but he who has the legal title is put in the way of pursuing his proper remedy. It was said that where the *mandamus* is to restore, the Court will go further ; but the whole effect of the latter kind of writ is to put the officer to his original title, and in both cases he must stand or fall by the validity of that. The effect of modern improvements on this branch of the law has been to afford a greater facility in trying the original title upon the *mandamus* to admit : and after restoration upon the other writ, the validity of the original title may be disputed in proceedings in *quo warranto* ; or if it were at first good, and has been since determined by a legal motion, that may be examined upon the return and subsequent proceedings on the writ to restore. If two persons are in possession of the same office, whether under a *mandamus* or otherwise, and it is the right of one only, the acts of the other and all those in which he joins are void, being those of an usurper.

Who is an
officer de
facto.

727. To constitute even an officer *de facto*, there must be at least the forms of election and admission,

(727) *R. v. Hebden*, Andr. 391. *R. v. Lisle*, 2 Str. 1090. *S. C.* Andr. 172. *R. v. Cambridge*, 4 Bur. 2010. *Symmers v. Regem*, Cowp. 502.

though these may upon legal objections be afterwards found defective. Therefore one admitted under color of having been elected, is not even an officer *de facto*, but a mere usurper, whose acts are an absolute nullity, and whose office is merely void, so that it is unnecessary to oust him in *quo warranto*. But if one so getting into office have for a long while held undisturbed possession, the length of time will give it sanction so far as to render his acts voidable only, and not absolutely void; and if that possession be continued for six years, he will be within the protection of the statute of 32 Geo. III.

11. HOW INVESTIGATED.

728. After one is in the actual possession of an office under the semblance of a legal election or appointment and admission, his title may be investigated by proceedings in *quo warranto*, the form of which will be considered in a distinct chapter. By Quo Warranto.

729. The title of the head officer may be put in issue, either in proceedings in *quo warranto* against himself, or on similar proceedings against a person elected or admitted at an assembly where he presided, or against one who was admitted by him. But the titles of other officers and corporators can only be investigated on such proceedings against themselves individually, although after ouster of the electors on whose Against whom.

(729) V. tit. 97. and *Quo Warranto*, Evidence. R. v. Mein, 3 T. R. 598. R. v. York, 5 T. R. 73. R. v. Smith, 5 M. S. 279. R. v. Hughes, 4 B. C. 378.

votes a defendant's election depends, the judgment against them is evidence to impeach his title.

Who may
defend in-
stead of the
officer.

730. This right which the prosecutor has to investigate the title of the officer under whom the defendant was elected, gives all those whose titles depend upon the legality of his office, an interest in defending it. For this reason, if an information in the nature of quo warranto be prosecuted against A. and he allow judgment by default to be entered against him, the Court will, on motion on behalf of persons so interested, set it aside, and, on their indemnifying the defendant against the costs of the proceeding, allow them to defend the prosecution in his name, although it appear that the default was merely voluntary and not collusive. For otherwise either by the defendant's fear of incurring the expence of the proceedings or by his collusion with the prosecutor, the titles of corporators having the best right to their franchise might be defeated, or put in a critical situation on account of the difficulty they might afterwards have in proving that the judgment was collusive.

III. THE CONFIRMATION OF TITLE.

731. Although the original title of a corporator may be defective, after he has continued a certain time in the undisturbed enjoyment of his office, he is protected in some measure by the equitable discretion of the Court, and in other instances by several statutes.

Protection
by the
Court.

732. The Court uses that discretion which the law has reposed in them, as to granting permission to file

(730) *R. v. Dawes*, 4 Bur. 2279. *R. v. Hebden*, Andr. 392.

(732) *V. Quo Warranto*, Who may be relator.

an information in the nature of quo warranto, by uniformly refusing it when the applicant comes to defeat a title which he has concurred in conferring, as by joining in the election of the person against whom he now applies, or even if he did not originally concur in the election, but has subsequently acquiesced in the corporate acts of such officer de facto; and by as uniformly refusing it to a stranger who intermeddles unnecessarily with the affairs of the body politic. On this subject more will be said in treating of the information in the nature of quo warranto.

733. The statute of Charles required among other things that no person should hold certain offices in a Corporation, unless he should have received the sacrament according to the rites of the Established Church within the year preceding his election; and in default of this qualification, rendered the election void. The inconveniences arising from this induced the legislature to supply a remedy by the statute of George, and has since caused the annual enactment of a statute called the Indemnity Act.

Protection
against
13 Car. II.

734. "No person or persons who shall be placed, elected, or chosen in or to any of the offices aforesaid, shall be removed by the Corporation or otherwise prosecuted for or by reason of having omitted to take the sacrament of the Lord's supper as aforesaid (v. tit. 506.) nor shall any incapacity, disability, forfeiture or penalty be incurred by reason of the same, unless such person be so removed, or such prosecution be commenced within six months after such person's being placed or elected into his respective office as aforesaid,

Corporate
officers.

and that in case of a prosecution, the same be carried on without wilful delay."

Not protected before admission.

735. This statute does not extend its protection to those who are elected, but have not been admitted. Until admission the title is not consummate, and until then no prosecution can be commenced, either for the forfeiture, or on an information in the nature of quo warranto to oust him from the office. On this account if one have been elected, without having qualified under the statute of Charles, he is not entitled to a mandamus to be admitted, even after the expiration of six months from the day of his election.

Extent of protection for first six months.

736. If an officer so disqualified have been elected and admitted; for the first six months after admission he is liable to the forfeiture incurred by his neglect and to be ousted by judgment on an information in the nature of quo warranto, on proceedings commenced within that time. But as the office is only voidable, and not void as it formerly was, he may during that period obtain a mandamus for the insignia and other things belonging to his office. His acts of a corporate character done during this interval are conditionally legal or voidable; that is, if the six months elapse without any effectual prosecution for the purpose of avoiding the office, they are legalized by the event and of the same validity as though he had been entitled to hold the office from the beginning with an unimpeachable title. But if such a prosecution be commenced within that time, and effectually carried on, and the usurper ousted, all the acts which he has executed, or in which

(735) *Tufton v. Nevinston*, 2 Ld. Ray. 1354. *R. v. Monday*, Cowp. 539.

(736) *Crawford v. Powell*, 2 Bur. 1016. *R. v. Monday*, Cowp. 539.

he has joined are voidable, for he is now ascertained to have been merely an officer de facto.

737. After the expiration of six months from the day of election, no prosecution having been effectively commenced, the effect of this statute is not only to legalize the antecedent acts of the officer, but to invest him with an indefeasible title (as far as receiving the sacrament was necessary) during all the rest of the time for which his office was designed to continue. After six months.

738. The calculation of six months is thus : if the rule nisi for a quo warranto have been granted before the expiration of that time, in the case of Brown it was considered doubtful whether the prosecution were not sufficiently commenced, although the information was not filed until after the six months had elapsed, the rule nisi having been obtained within that time. This was immaterial to the decision of the case, as the defendants had a subsequent opportunity of relying upon the fact ; and from two other cases, the one more ancient, the other subsequent, it may be concluded that the officer is protected by the statute unless the rule have been made absolute within six months ; for in the case of Monday it was observed, that this statute affords a protection similar to that which the Court had formerly yielded by limiting the time after which they refused an information, which was calculated from the time of election to that of making the rule absolute ; and in the case of Stokes it was said that the limitation of the statute of 32 Geo. III. was in accordance with the rule previously established by the Court. Time, how reckoned.

(737) *Crawford v. Powell*, 2 Bur. 1016. *R. v. Monday*, Cowp. 539.

(738) *R. v. Brown in R. v. Smith*, 3 T. R. 574. n. *R. v. Monday*, Cowp. 539. *R. v. Stokes*, 2 M. S. 72.

Effect of
this protec-
tion.

739. A. had not received the sacrament within a year before he was elected alderman, but he subsequently received it, and within a year afterwards was elected mayor; it was necessary that the person elected to the office of mayor, should be at that time an alderman, and it was argued that though this statute operated after six months' undisturbed enjoyment so far as to remove all objection to A.'s title to the particular office of alderman, it did not so warrant that title, as to qualify him to be elected mayor. But the Court held that the title being rendered to all intents and purposes as valid as though he had duly received the sacrament, he was as eligible to be mayor, as though he had complied with that requisition. And upon argument on a mandamus to be admitted mayor, it being objected that he ought to have brought himself within the scope of the statute, by averring in his writ an enjoyment of the previous office without prosecution during the first six months, the Court held it unnecessary and that if the defendant relied on a prosecution within that time, he ought to have set it forth in the return.

740. The remedy of the inconvenience arising from the Corporation act has been rendered more complete by the annual Indemnity Act, of which the following is an abstract, omitting such parts as are irrelevant to the subject of this treatise.

Indemnity
act.

741. Every person who, at or before the passing of this act, hath or shall have omitted to take the oaths or to receive the sacrament, or otherwise to qualify himself, within the time in any former act required, and

(739) *Martin v. Jenkins*, 7 Mod. 366.

(741) 7 Geo. IV. c. 3. s. 1. Vid. st. 1 Geo. I. st. 2. c. 13. 9 Geo. II. c. 26. 16 Geo. II. c. 30.

who, after accepting any such office or place on account of which such qualification ought to have been had and is required, before the passing of this act hath taken the said oaths and received the sacrament, or who, on or before the 25th March 1827, shall duly take the said oaths and receive the sacrament, shall be and is indemnified, freed and discharged from and against all penalties, forfeitures, incapacities and disabilities incurred or to be incurred for or by reason of any neglect or omission previous to the passing of this act of taking the said oaths or receiving the sacrament, and such person is and shall be fully and actually recapacited and restored to the same state and condition as he was in before such neglect or omission, and shall be deemed and adjudged to have duly qualified himself according to such acts and every of them, and all elections of and acts done or to be done by any such person, or by authority derived from him, are and shall be of the same force and validity as the same or any of them would have been if such person had taken the said oaths and received the sacrament according to the direction of the said acts and every or any of them; and the qualification of such person qualifying himself in manner and within the time appointed by this act, shall be to all intents and purposes as effectual as if he had taken the said oaths and received the sacrament within the time and in manner by the same acts appointed.

742. " But this shall not extend to indemnify any person against whom final judgment shall have been given in any action of debt, bill, plaint or information, in any Court of record for any penalty incurred by having

neglected to qualify himself within the time limited by law."

743. "This act shall not extend to restore or entitle any person to any office or employment already actually avoided by judgment of any Court of record, or already legally filled up and enjoyed by any other person; but such office or employment so avoided or legally filled up and enjoyed, shall be and remain in and to the same person who is now or at the passing of this act shall be legally entitled to the same."

744. This act extends to indemnify persons elected *after the time* of passing it, at any time within the year as well as those who had accepted office before that period, if they conform to its regulations.

745. A., after notice having been given to his electors that he was disqualified, by not having received the sacrament, received the majority of votes. B., who was so qualified, received the next greatest number. Both applied to be admitted: A. was admitted, and B. rejected. A. afterwards qualified within the time allowed by the annual Indemnity Act. It was held that by this statute A. was protected in his office, although B. ought to have been admitted at the time of his application. But if B. alone had been admitted, A.'s subsequent qualification would not have entitled him to be afterwards admitted instead of B. Or if both A. and B. had been admitted, B. being from the beginning a legal officer, the place was so filled as to preclude A. from reaping the advantage of such subsequent qualification.

(743) 7 Geo. IV. c. 3. s. 7.

(744) *Stevenson's Case*, 2 B. C. 34.

(745) *R. v. Parry and Phillips*, 14 East, 561. *R. v. Monday*, Cowp. 540. *R. v. Hawkins*, 10 East, 215. 218.

746. These statutes extend only to protect those who, Operation of these statutes. having an indefeasable title in all other respects, have neglected to comply with certain forms required by a former statute. The following act is of a different kind; it extends to protect all persons in the enjoyment of a corporate office after six years' possession, however defective their title was originally.

747. "It shall and may be lawful for the defendant or Plea, six years. defendants to any information in the nature of quo warranto, for the exercise of any office or franchise in any city, borough, or town corporate, whether exhibited by leave of the Court, or by his majesty's attorney-general, or other officer of the crown on behalf of his majesty, by virtue of any royal prerogative or otherwise, and each and every of them severally and respectively to plead that he or they had first actually taken upon themselves or held or executed the office or franchise which is the subject of such information, six years or more before the exhibiting of such information, such six years to be reckoned and computed from the day on which such defendant so pleading was actually admitted and sworn into such office or franchise."

748. If there be six years from the day of admission, to that on which the information is filed, the defendant is protected, although the application to the Court for the rule were made within that time.

749. Before this statute the Court had made a rule Legalizes past acts. of nearly similar effect, and would not allow the title

(747) 32 Geo. III. c. 58. s. 1.

(748) R. v. Stokes, 2 M. S. 72.

(749) Symmers v. Regem, Cowp. 502. R. v. Dicken (a general rule), 4 T. R. 284. R. v. Peacock, 4 T. R. 685. R. v. Stokes, 2 M. S. 73.

of a corporator to be investigated after he had been in possession of the office for six years, although he had never been admitted. After the expiration of that time, both under the rule and now under the statute, which was passed in affirmance of it, to prevent the danger of future doubt, the possessor is a legal officer from the beginning to all intents and purposes; all his corporate acts are as valid as those of any other officer upon whose title no doubt ever existed.

Information refused after six years.

750. As it is in vain to allow an information to be filed which may be rendered nugatory by this plea, the Court will refuse leave to file it when it appears incontrovertibly by the affidavits for the defendant, upon showing cause to the application, that he is in a situation to rely upon it; besides, the rule extended to the granting leave to file the information.

What title within the act.

751. But the Court appearing rather perplexed with the peculiar circumstances of the case of Stokes, granted leave to file an information to try a title founded upon a previous title which they considered to be protected by the statute.—The case was this: the affidavits upon which the motion was founded, stated that the constitutional number of common-council-men was twelve besides the mayor, and no more—that this number being complete, Stokes usurped the office of common-council-man, and two years afterwards the office of mayor; none could be elected mayor who were not at the time common-council-men. The application was made immediately on the expiration of six years from the usurpation of the office of common-council-man. The Court

(750) R. v. Stokes, 2 M. S. 72.

(751) R. v. Stokes, 2 M. S. 71. Vide 739.

held that the office of common-council-man was protected by the statute, and granted an information to try the title to the office of mayor. If the rule before laid down is to be relied upon, the Court considering the office of common-council-man protected by the statute, and from the commencement legal "to all intents and purposes," how can it be impeached upon an information to try the title to the office of mayor, and can there be any doubt that the defendant may rejoin the statute in protection of his antecedent title, if put in issue by the opposite party, for then that title becomes "the subject of the information?" The real question is, whether the defendant's title to be a common-council-man is protected by the statute? The constitutional number being complete without the defendant, he cannot be said even to "have held or executed the office;" for there were but twelve such offices in case, and these being held by twelve other persons, he never was possessed of an office, either as an officer de facto, or even as a mere usurper, but was barely one who intermeddled in the affairs of the Corporation without the least shadow or color of being an officer, but as a mere pretender, whose interference had been endured.

752. To the plea given to the defendant by this statute, "the prosecutor of such information may reply any forfeiture, or surrender, or avoidance by the defendant of such office or franchise, happening within six years before the exhibition of such information, whereon the defendant may take issue."

Replication, forfeiture, &c.

753. It has been already observed, that on proceedings in quo warranto the title of the president under

President's title protected.

(752) 32 Geo. III. c. 58. s. 2.

(753) V. tit. 97.

whom the defendant was elected may be put in issue. The third section of this statute empowers the defendant to protect the title of the president from examination, where the president had been in possession of the office six years before the filing of the information.

754. "If any person or persons against whom any such information in the nature of a quo warranto shall be exhibited, shall derive title under an election, nomination, swearing into office, or admission by any person or persons, the title of such person or persons against whom such information shall be exhibited shall not be defeated or affected by reason or on account of any defect in the title of such person or persons so electing, nominating, swearing into office, or admitting, in case such person or persons under whom title shall be derived as aforesaid was or were in exercise de facto of the franchise or office (in virtue of which he or they so elected, nominated, sworn in, or admitted) at a period six years at least previous to the time of filing such information, and his or their title shall not have been questioned by any legal proceeding carried on with effect."

III. DURATION.

Head officer, annual.

755. The office of the mayor or other head officer is annual, and ipso facto expires on the determination of the year next after the annual charter day on which he ought to be elected. The effect of which is, that if a mayor be elected but a few months before the charter

(754) 32 Geo. III. c. 58. s. 3.

(755) *R. v. Sir R. Atkyns*, 3 Mod. 12. *R. v. Hearle*, 1 Str. 627. *Mayor of Durham's Ca.* 1 Sid. 33.

day, his office may only endure for two or three months, and if a mayor be improperly amoved during his office, he may be restored at any time before the next charter day, yet he cannot enjoy it for a portion of time equal to that which expired between his amotion and restoration, but on the charter day it determines; and if a mayor so amoved is not restored before the next charter day, he cannot be restored afterwards.

756. But in some Corporations the head officer has a power to hold over until a successor is "provided; this can only be by force of a custom or express provision of the statute or charter, for the statute of 11 Geo. I. does not operate to give a mayor the power of holding over where he had it not before. Where the head officer has this power of holding over, a successor ought to be chosen on the charter day, and immediately admitted, except where custom has provided a special manner of admission. But if a successor be not admitted, the head officer of the preceding year continues to be legally in office until another duly qualified is elected, admitted and sworn; and his office does not determine during the usurpation of one or many successive officers de facto. The same is the law where there are several head officers.

Holding
over.

757. If a head officer who has power to hold over be amoved and restored during the year, he has the same right of holding over, but no prolongation of office. If such an officer be improperly amoved, and not restored before the next charter day, he must be afterwards restored, unless, though amoved, he has presided at the election of a successor, or one has been elected under a

Restora-
tion.

special power; for unless he be restored, or preside notwithstanding the amotion, or there be such special power, no legal successor can be elected; but he is not entitled to be restored for the purpose of holding the office for so long a time as he had been amoved, for where a successor might have been elected at any time, one may be elected immediately upon his restoration.

Aldermen,
&c. for life.

758. At common law the office of an alderman is a franchise, which the possessor is entitled to enjoy for his life; so is the office of a jurat, portman, capital burgess, or other member of a select body, being an integral part of the Corporation. But the prescription, statute or charter may render them eligible for any definite period. Yet, though rendered eligible for a year, their office is so much of the nature of a freehold, that they are implied to have a right of holding over, unless there be a clear provision to the contrary.

Annually
eligible.

759. On this account, where the charter declared that the first aldermen should continue until the 9th of October then next, and until other burgesses should be elected and sworn into their places, according to the order and provisions for electing a mayor, and proceeded to direct that the mayor and burgesses should after that day annually choose one of the aldermen to be mayor for one year next following, and until another should be chosen into his place: it was held that the aldermen as well as the mayor were eligible annually, and that their office continued from the time of election until the following 9th of October, and after that time until others were chosen into their places, although many years

(758) *R. v. Doncaster*, 2 *Ld. Ray.* 1564. *Prowse v. Foot*, 3 *Bro. P. C.* 169. *S. C.* 1 *Str.* 625.

(759) *Prowse v. Foot*, 3 *Bro. P. C.* 169. *S. C.* 1 *Str.* 625.

might elapse before such an election should be made. So that they possess in this case rather a conditional freehold than a mere annual office, but one which may be defeated by an election of other burgesses into their places, without the necessity of a preliminary motion, and which ipso facto determines upon the election and admission of others duly qualified.

760. So if the charter appoint aldermen annuatim elegendi, these words are only directory, and the aldermen of the preceding year continue legally in office until others are elected.

761. And if the charter appoint that the Corporation may be able (possint) to annually elect aldermen, it seems that the aldermen are officers for life, with a liability of being superseded, and not mere annual officers.

662. Officers who are constituent parts of the Corporation cannot hold their offices at the will of the others, and a custom that they should so hold them, or an express clause in a charter to this effect, would be merely void.

763. When the charter declares that the aldermen shall be aiding to the head officer, although he is eligible out of the aldermen, the inferior merges temporarily in the superior office, so that he cannot be present and act in each distinct character at the same time.

Merges in
the office of
mayor.

(760) Foot v. Prowse, 1 Str. 625.

(761) V. tit. 537.

(762) V. tit. 653.

(763) R. v. Thornton, 4 East, 307.

Common
council-
men.

764. The duration of the office of common-council-men depends upon the particular constitution of each Corporation; they may be officers for life, which they are, unless there be a different regulation; or they may be officers annually elected, or holding their offices merely at pleasure. If the common-council is created by a by-law, whether they are appointed to hold for an indefinite period, which is a freehold, or for a time certain, it would seem that their offices ipso facto determine upon the repeal of the by-law. They are not recognized by the common law as a select body, nor is their office noticed, either as to its nature or duration; because the common law considers the common-council to be the whole of the corporators convened in council for the management of their affairs, or so many of them as please to attend, without any other qualification than that of being freemen; and this common-council is incident to all Corporations of common right, unless the charter have otherwise regulated it. For this reason, when the common-councilmen are a select body, the nature of their constitution and office must be specially shown in the pleadings.

Freemen.

765. The franchise of a burgess or common freeman is a freehold for his life; but it may be made to depend upon residence within the municipality, which is sometimes the case, or perhaps upon some other condition.

Recorder,
&c.

766. Such offices as those of recorder and town clerk depend for their duration upon the particular constitution of every Corporation; they may be for life, for a

(764) *Case of Corporations*, 4 Co. 77. b. *R. v. Knight*, 4 T. R. 431. *R. v. Chalke*, 1 Ld. Ray. 226. S. C. Comb. 397.

(765) *Symmers v. Regem*, Cowp. 506.

(766) *R. v. Durham*, 10 Mod. 147. *Dighton's Ca.* 1 Vent. 82.

year, or other term certain, or during pleasure. But they are at common law offices for life, or rather *dum bene se gesserint*; for this reason, if they are to be appointed for a shorter period, it should appear in the pleadings. Their offices also are so much in the nature of a freehold, that if they are "eligible for a year" and constituted in general terms, they do not expire with the year, but the possessors are entitled to hold over until others are elected. Yet if they are "eligible for a year *only*," the office *ipso facto* determines on the expiration of the year.

767. A Corporation can only appoint such officers as the nature of their constitution requires; therefore, unless empowered by the prescription or charter, they cannot appoint a livery; nor can they appoint constables without a special power, for they are to be appointed at the court-leet, and if there be none, at the turn, which is the general leet of the county. Other officers.

768. The moment the office of a principal determines, Deputy. by death or otherwise, the authority of the deputy is at an end, and all his subsequent acts are void, at least after the death of the principal is known. They have not even the force of acts done by an officer *de facto*, for he is not an officer, but merely the representative of the principal while alive.

(767) *Vintners v. Passey*, 1 Bur. 237. *Hastings' Case*, 1 Mod. 24. *R. v. Barnard*, Comb. 416.

(768) *R. v. Bedford Level*, 6 East, 369.

SECTION II.

POWERS, PRIVILEGES, DUTIES, ACTS, &c.

Corporate
powers.

769. A municipal Corporation has at common law few powers beyond those of electing, governing, and amoving its members, and regulating its franchises and property. These are presumed to arise out of general consent, and the necessity of self-preservation; this assent is manifested in the first instance by acceptance of the charter, and subsequently by becoming members of the body politic. Hence the power of the governing officers can extend only to the administration of the by-laws and other ordinances by which the body is regulated. Corporate officers, as such, have no power of administering the general laws of the land, or holding a court of justice; but this is generally conferred upon some of them by a distinct and express commission in the particular charter, or by the general provisions of an act of parliament.

Distinct
from ma-
gisterial.

770. The powers of corporate officers, as corporators, are therefore quite distinct from their authority as municipal magistrates and judges of an inferior court, or in any other specific capacity. For this reason they will be but briefly alluded to in this treatise.

Exempt ju-
risdiction.

771. When the king grants to the inhabitants of the municipality that they shall be sued in their own courts,

(769) *R. v. Sir R. Atkyns*, 3 Mod. 12. *R. v. Langley*, 2 Ld. Ray. 1030.

(770) *Jones v. Williams*, 5 D. R. 663.

(771) Reg. Brev. 219. b. S. C. 12 Mod. 644. *Cross v. Smith*, 2 Ld. Ray. 837. *Foxwhist v. Tremaine*, 2 Saund. 209. b. n. 1.

and not elsewhere, the Corporation has an exempt jurisdiction, which may be pleaded to the jurisdiction of the superior courts, if they have a court capable of entertaining the plea. This differs from a conuizance, in as much as this is the privilege of all the individuals, and must be pleaded by the defendant; whereas if a court have conuizance of pleas, it cannot be pleaded by the defendant, but the court must make claim of the conuizance, showing its title in the court which has possession of the action, where it must be allowed. The privilege of an exempt jurisdiction belongs to the defendant alone, so that if the plaintiff proceed in another court, the defendant may plead to the jurisdiction; but this must be before making full defence, and the plaintiff cannot proceed before this plea is determined. If the plaintiff institute his suit in the municipal court, the defendant may wave his privilege, and come to the Court above for a certiorari to remove the proceedings.

772. An exempt jurisdiction can be granted by the crown to no person or body of persons but a municipal Corporation.

773. A ne intromittat clause in a grant of conuizance does not exclude the superior courts, but the justices of the county are excluded by it, and possess no concurrent jurisdiction. But a concurrent jurisdiction over a place may be granted to a Corporation together with the county magistrates, and this is the case where jurisdiction is granted to a Corporation without a ne intromittat clause over a place where the county justices had formerly jurisdiction.

(772) *Cross v. Smith*, 2 Ld. Ray. 837.

(773) *R. v. Cambridge*, 2 Ld. Ray. 1339. *R. v. Grey*, 8 Mod. 361. *R. v. Sainsbury*, 4 T. R. 431. *Bates v. Winstanley*, 4 M. S. 429. *R. v. Amos*, 2 B. A. 533. 2 Chest. Ca. 557.

To try
causes.

774. A Corporation court may entertain a cause, although between a corporator and a stranger to the Corporation, and although a judge of the court, even the mayor, be one of the parties, if the court be complete in the absence of that judge, for he cannot sit to determine his own cause.

775. But they cannot entertain a cause in which the whole Corporation is a party against a stranger, therefore they cannot entertain an action brought against one for a toll claimed to be due, either wholly or in part, to the Corporation. This must be tried in the King's Courts.

776. Some observations have already been made on the proceedings of corporate Courts and their jurisdiction, as far as relates to corporate purposes; their proceedings in administering the general law is foreign to the plan of this volume.

777. The common-council has not an incidental right to act as a court, in the investigation of the validity of an election.

Corpora-
tors not
justices of
right.

778. A mayor, alderman, or recorder, merely as such, is not at common law a justice or conservator of the peace, and therefore in his corporate capacity ought not to exercise the powers of fining or committing to prison, but should do such acts in his character of a justice of peace.

(774) *London v. Markwick*, 11 Mod. 164. S. C. 1 Bro. P. C. 218.

(775) *Player v. Archer*, 2 Sid. 105. 121.

(776) V. tit. 186. 399.

(777) *Jeffs v. Bolton*, 11 Mod. 386. S. C. Fort. 349.

(778) *R. v. Langley*, 2 Ld. Ray. 1030. *Sir R. Atkyns' Case*, 3 Mod. 12.
Jones v. Williams, 5 D. R. 662. S. C. 3 B. C. 767.

779. But it has been usual in charters expressly to confer on the mayor and a certain number of the principal corporators a commission of the peace, by virtue of which, those who hold the offices from time to time become invested, in right of such offices, with the powers and character of temporary magistrates. The authority is permanent, and in the nature of a perpetual commission, the powers of which are to be exercised successively by the different persons who fill certain offices designated by the charter.

But some
are usually
created.

780. This authority cannot be granted by mere implication: or at least it cannot be implied, from a grant that the recorder shall be a justice of the peace, that the deputy recorder is also a justice, where not appointed by the charter to be one.

Not by im-
plication.

781. Nor can it be inferred that a deputy alderman is a justice of the peace, where the charter empowers the aldermen, who are declared to be justices of the peace, to appoint deputy aldermen during their absence from the borough, particularly if it neither require that the deputies be selected from among the corporators, nor that they shall be obliged to take an oath for the due discharge of their duty. Much less can it be implied under these circumstances, where the Corporation also is empowered, in the absence of such aldermen, to elect others to be aldermen during their absence, which temporary aldermen are expressly declared to be justices of the peace.

(779) *Weatherhead v. Drewry*, 11 East, 175.

(780) *Anonymous*, 2 Barnard. 237. *R. v. Gravesend*, 4 D. R. 117. S. C. 2 B. C. 604.

(781) *Jones v. Williams*, 5 D. R. 662. S. C. 3 B. C. 767.

Cannot be
empowered
to delegate
authority of
justice.

782. Indeed, it seems that the crown cannot grant the principal officers who are constituted justices, power to create deputies with similar authority. For though it may grant mayors, aldermen, and recorders, power to delegate their office merely as mayor, alderman, or recorder, which they cannot do without an express authority; yet the office of a judicial magistrate is of so high a nature, that it cannot be delegated under the express sanction of a charter; for an act of parliament has provided that "no person shall have any power or authority to make any justice of the peace, but that all such officers shall be made by letters patent under the king's great seal, in the name and by the authority of the king, any grants, usages, prescriptions, allowances, act or acts of parliament to the contrary notwithstanding. Provided that cities, boroughs and towns corporate, which have liberty, power and authority to have justices of the peace, shall still have and enjoy their liberties and authorities in that behalf, after such like manner as they have been accustomed."

783. At least, if the king can grant such a power of delegation, it must be in express words, such as "the deputy shall be a justice of the peace;" and the Court will not intend such a grant. On this it may be observed, that there is nothing in the statute to prohibit the king from constituting deputy mayors, or aldermen justices, but that it excludes only the leaving a discretion in the mayor, whether they shall be mere deputies or whether they will give them the authority of justices.

(782) *Jones v. Williams*, 3 B. C. 767. S. C. 5 D. R. 660. 27 H. VIII. c. 24. s. 2. 6. Com. Dig. Justice of Peace, A. 1.

(783) *Jones v. Williams*, 3 B. C. 766, S. C. 5 D. R. 661.

784. "In all writs of assize, and of actions personal sued or to be sued before the king in his Bench, Justices of the Common Pleas, or any other king's justices for the time being, of any lands or tenements, or of any thing being or arising within any seignory, franchise or ancient demesne, whereof the cognizance or jurisdiction ought to pertain to any lords, mayors, bailiffs, citizens, burgesses, or commonalty of such seignories, franchises or ancient demesne, that then if any defendant in any such assize, or other actions personal, make any default to put out, exclude, and expel, the aforesaid lords, mayors, bailiffs, citizens, burgesses or commonalty of their cognizance or franchise, that the justices at the request of the said lords, mayors, bailiffs, citizens, burgesses or commonalty, shall make enquiry by the assize, where such exception is alleged in assizes, and in actions personal, by inquests to be taken before the justices, if such defaults are made as before is said or not. In which assize and inquests to be taken, as well the plaintiffs as the lords, mayors, bailiffs, citizens, burgesses, and commonalty, may have their challenge. And if it be found by such assizes or inquests so to be taken, that such defaults shall be made by collusion, to put out and exclude the said lords, mayors, bailiffs, citizens, burgesses or commonalty, of their franchises, liberties, cognizances or jurisdiction, that in such cases the said writs shall be abated, and the plaintiffs shall be in the king's mercy," &c.

When justices by force of statute.

785. "Mayors justices or justice of peace, sheriffs and bailiffs of cities, towns, and boroughs having franchise, (shall) have in the same cities, towns, and boroughs,

(784) 8 H. VI. c. 26. et vid. 9 H. IV. c. 5.

(785) 8 H. VI. c. 9. s. 6.

like power to remove such entries (with force into lands and tenements, or them after entry holding with force) and in other articles aforesaid (v. stat.) rising within the same, as the justices of peace, and sheriffs in counties have."

786. By this statute all mayors are for the particular purposes of it, created justices of the peace, or rather endowed with precisely similar powers; so that if a mayor sign a conviction under the statute, "A. B. mayor," instead of "A. B. justice of the peace," it is sufficient.

Union of
judicial of-
fices.

787. Where a court may be held by a steward and portreeve or their deputy, if one person can be both steward and portreeve, he may hold it alone, or he may appoint one person to be both deputy-steward and deputy-portreeve; and such deputy alone may hold the court.

Power to
make rates.

788. "Whereas by an act for the more easy assessing, collecting, and levying of county rates, (12 Geo. 2. c. 29.) "several powers and authorities are given to the justices of the peace in England, within the respective limits of their commissions, at their general or quarter sessions, from time to time to make one general rate or assessment for such sum or sums of money, as they in their discretion shall think sufficient to answer all and every the ends and purposes of the several acts therein recited; but there being a proviso in the said act that the same or any thing therein contained should not extend or be construed to extend, to make any persons

(786) Colonel Layton's Case, 11 Mod. 46. S. C. 1 Salk. 106. 353. S. C. Fort. 173.

(787) Green v. Davies, 3 B. A. 63.

(788) 13 Geo. II. c. 18. s. 7.

liberties, divisions, or places, liable to pay any rate to be made in pursuance of the said act, to which such person, liberty, division, or place, did not or was not liable to contribute before the passing thereof; some doubts have arisen whether the said act doth extend to liberties and franchises, which are not within the jurisdiction of the commissions of the peace for the counties in which such liberties and franchises lie, and so never did nor were liable to contribute to the said county rates. It is enacted that where any liberties or franchises within England have commissions of the peace within themselves, and are not subject to the jurisdiction of the commissions of the peace for the counties in which such liberties or franchises lie, and do not nor did before the making the said in part recited act, contribute or pay to the several rates made for the said counties; it shall and may be lawful to and for the justices of the peace of such liberties and franchises within the respective limits of their commissions to have, use and exercise all and singular the powers, authorities and methods given or prescribed by the said in part recited act, and all such liberties and franchises are hereby declared to be subject thereto in the same manner to all intents and purposes as counties at large are."

789. This statute empowers the magistrates of exclusive jurisdictions which do not pay towards the county rate, to act in the same manner as county justices in making a similar rate, and it extends to magistrates of municipalities which are *not counties* in themselves.

All chief officers equal in power.

790. By whatever name the chief officer of a municipal Corporation is called, his office is at common law of precisely the same nature, and invested with the same power and authority. So, if there are two chief officers, as where there are two bailiffs, the authority of the two acting together in their corporate capacity is equivalent to that of a sole chief officer and not greater. Unless there be a special provision in the charter, one of the two cannot by himself act as chief officer, but they must join in all corporate acts.

791. The chief officer admitted by the next in place, when presiding by virtue of the statute of George, "shall have the same privileges, precedence, powers, and authorities in all respects as any mayor, bailiff or bailiffs, or other chief officer or officers of the same city, borough or corporation elected on the days or times fixed by charter or usage for that purpose ought to have and enjoy."

Powers of Common Council.

792. The law considers the power of the common-council-men in common council assembled, to be that of the whole Corporation, for it is intended that either all are present, or that those who are absent confide in those who are convened, and tacitly assent to all acts done by a majority of them. This is the only common-council recognized by the common law ; therefore if an act be averred to have been done by the common-council, it is presumed to have been done by the Corporation at large in common-council assembled, until it is shown that the common-council is a select body ; and if the

(790) R. v. Thornton, 4 East, 308. V. tit. 96. 99.

(791) 11 Geo. I. c. 4. s. 4.

(792) R. v. Knight, 4 T. R. 431. R. v. Chalke, Comb. 397.

body called a common council be a select body, they are not judicially noticed, but the pleadings must show their constitution and powers, which are derived wholly from custom or grant.

793. But an averment that a select body called the common council is prescriptive, or an averment on which it is necessary to show this, may be supported by evidence of the following description:—

It is not necessary to show that the body has been continually called a common council, but only that there has existed a select body in whom the administration of municipal affairs has been constantly vested.

If a charter granted 200 years ago, referred to a select class of this kind as then in existence, new modelled it, and altered its former name to that of common council, it shall not be presumed that anterior to the charter, there was another common council, being a convention of the whole body; although there is no evidence that the body referred to ever assembled as a select common council.

794. An ancient return was prefaced with an entry that A. was elected at a meeting of the “good men of the common council”—the return itself was, “we the mayor and commonalty” have elected A.; the corporate name was mayor and burgesses.—It was held that this was not inconsistent with other evidence that the common council was at that time a select elective body, chosen out of the commonalty, for though the election is made by a select body, the return may well be in the name of the Corporation at large.

(793) *R. v. Knight*, 4 T. R. 429.

(794) *R. v. Haythorne*, 5 B. C. 427, 428.

Privileges
of corpora-
tors.

795. The peculiar privileges of corporators depend upon the terms of the charter by which they are granted, for privileges are not incidental to the members of a body politic. Under ancient charters the corporators have been sometimes exempted from serving common law offices, such as those of jurymen, constables or head boroughs, but to maintain such privileges the words of the charter must be clear and indisputable.

796. When the members of a Corporation have such privileges of exemption, they cannot be claimed by one under color of being a member; if a townsman of Oxford be matriculated as a servant of the University, not being really such, he is not entitled to exemption from serving the offices of the town and municipal Corporation.

Exclusion
of corpora-
tors.

797. A corporator cannot be judge in a cause between the Corporation and a stranger, on account of the interest which he has in the proceeding; but though the judges of a municipal court be corporators, if they do not sit as a corporate Court, they may entertain a suit from which the Corporation may derive an advantage, if its interest be not the question in dispute.

798. A corporator cannot be a juror, nor can he empanel the jury in a cause between the Corporation and a stranger.

(795) *R. v. Clarke*, 1 T. R. 685. *R. v. Pugh*, Doug. 181. *R. v. Routledge*, Doug. 520. *Canterbury Case*, Hardres. 394.

(796) *City of Oxford Case*, 2 Vent. 106.

(798) *Kynaston v. Shrewsbury*, Andr. 104. *Hesketh v. Braddock*, 3 Bur. 1855. *Sed vide Harris v. Wakeman*, Say. 255.

799. But on a trial in quo warranto against one claiming to be an alderman of a city being a county of itself, the men of the county may be jurors, although they are not freeholders.

800. Corporators cannot be witnesses in a cause between the Corporation and a stranger, to prove a right in the Corporation, such as their right to a toll, or to exclude foreigners from trading in the municipality.

801. But in the trial of the information in quo warranto against London, claiming the franchise of water baillage (2*d.* per chaldron on coal imported), freemen were admitted to give their evidence for the city, on account of the minuteness of their individual interest.

802. There are cases in which corporators have been admitted as witnesses, notwithstanding a remote interest in the question disputed. One of two elisors formerly appointed by the mayor in the absence of the town clerk to return a jury, was admitted to prove an usage for the mayor to appoint on such occasions; and the mayor who made the appointment or one of the jury is equally admissible.

803. And former mayors are admissible to prove the right to this office, where it depends on a custom: nor is it an objection to their testimony, that they are liable

(799) *R. v. Higgins*, 1 Vent. 366. S. C. 3 Salk. 81. S. C. T. Ray. 484. 486.

(800) Co. Lit. 157. a. *Brown v. London*, 11 Mod. 225. *Hesketh v. Braddock*, 3 Bur. 1855. *Mayor of Colchester's Ca.* 1 P. Wms. 596. n. 1 Phil. Evid. 61.

(801) *R. v. Carpenter*, 2 Show. 47. *R. v. London*, 2 Lev. 231.

(802) *R. v. Robins*, Str. 1069. S. C. *R. v. Bray*, C. T. H. 360.

(803) *R. v. Bray*, C. T. H. 360.

to an information in the nature of *quo warranto*, and may have judgment against themselves, unless the fact be as they state it, for they are called to prove usages in support of a custom which are best known to those who have acted under it, and were they rejected the best and sometimes the only evidence would be excluded.

804. A father is a good witness to prove a custom under which his son claims the freedom of the Corporation, whether he be himself a freeman or a stranger.

805. An *inhabitant* of a borough, *not* holding a *burgage* tenure, is a good witness to prove that the only persons eligible to be common-council-men are *inhabitants* holding a *burgage* tenure, for this shows no qualification in himself.

806. A corporator, although inadmissible as a witness, may be called upon to produce the corporate documents in an action for a false return to a *mandamus*, for he is a mere depository; and the party objecting to him for interest, is entitled to enquire of him concerning the custody.

807. If the evidence of a corporator be necessary, the only means by which he can be rendered competent, is his resignation or disfranchisement, which must be so far regular that he may neither be able to revoke his

(804) *Commins v. Oakhampton*, Say. 46.

(805) *Stevenson v. Nevinston*, 1 Str. 583. S. C. 2 Ld. Ray. 1353.

(806) *R. v. Netherthong*, 2 M. S. 338.

(807) *Brown v. London*, 11 Mod. 225. *Mayor of Colchester's Case*, 1 P. Wms. 596. n. 1 Phil. Evid. 127.

resignation, nor to reverse the proceedings on which he is disfranchised.

808. In quo warranto against the Corporation of a city, if the sheriff be a corporator the venire must issue to the coroners, if they are not members of the Corporation.

809. If the sheriff of the county of a city be in contempt, the attachment must go to the coroners and not to the mayor or chief officer.

810. The duty of a recorder is to advise the whole Corporation as a body, and not the bailiffs or other particular officers or classes in their distinct capacities: and if his oath, on admission, be to counsel the bailiffs on some particular subjects, as on the ordering and execution of their process and judgment, he is not bound to advise them in their distinct capacity upon any other occasions.

811. The judicial acts of an officer de facto, are valid; although he be subsequently ousted from the office for a latent defect of title, as for omitting to qualify under 13 Car. 2. before the passing of the statute of 5 Geo. 1. Acts of officer de facto.

812. So are ministerial acts which affect strangers, or are indispensable to the good of the Corporation, as

(808) *R. v. Worcester*, Skin. 91.

(809) *Anon.* 2 Vent. 216.

(810) *R. v. Ipswich*, 2 Ld. Ray. 1238.

(811) 1 Lutw. 519. *Ipsley v. Turk*, 2 Mod. 194. S. C. 2 Lev. 184. S. C. T. Jones, 81. *R. v. Castle*, Andr. 124. *R. v. Bedford*, 6 East, 369. *Denning v. Norris*, 2 Lev. 242. S. C. T. Jones, 137. *R. v. Monday*, Cowp. 530. 1 Hawk. P. C. c. 8. s. 3.

(812) 1 Lut. 519. *R. v. Lisle*, Andr. 173.

putting the common seal to an obligation, or making a return to a mandamus.

813. There is a quære whether a by-law made under a mayor de facto be valid or void. It is clearly void, for a by-law has not even the plea of necessity, and were it admitted to be good, the acts of usurpers might bind the legal members of the Corporation.

Acts of several officers.

814. When there are several judicial officers occupying the same office, as bailiffs, sheriffs or coroners, they may often act independently in their capacity of judges; but in their ministerial character they must all join.

815. When the Courts judicially take notice that several persons constitute one ministerial officer, as that there are two persons who constitute the sheriff of London, the act done by one of such persons is a mere nullity, as a return by one of the sheriffs of London. But when the Courts do not judicially notice the fact, the act of some of them is not a nullity, but imperfect only; therefore a return by three instead of the four coroners of a county, is cured by the statute of jeofails.

Punishment of officers.

816. "If any mayor, bailiff or other magistrate in England, Wales, Berwick upon Tweed, Jersey or Guernsey, shall knowingly or wilfully resort or be present at any public meeting for religious worship, other than the church of England, as by law established, in

(813) R. v. Castle, Andr. 124.

(814) Lamb v. Wiseman, Hob. 70.

(815) Id. ibid.

(816) 5 Geo. I. c. 4. s. 2.

the gown or other peculiar habit, or attended with the ensign or ensigns of or belonging to such his office, every such mayor, bailiff or other magistrate, being thereof convicted by due course of law, shall be disabled to hold such office or offices, employment or employments, and shall be adjudged incapable to bear any public office within England, Wales, Berwick upon Tweed, Jersey or Guernsey."

817. An action does not lie against a judicial officer for an error in judgment, unless it be shown that under color of his office he acted wilfully and maliciously. Action against.

818. An action does not lie against the steward of a court, for ordering that a freeman should be disfranchised until he paid a certain fine, although the freeman has sustained loss by the sentence, and been since restored under a mandamus, the punishment being illegal; unless it be shown that the steward acted maliciously, and for the express purpose of causing an injury to the person disfranchised.

819. But an action at the suit of a freeman, lies against the presiding officer for refusing his vote at the election of a mayor. *Quære.*

820. An action on the case lies against the presiding officer for refusing a poll on the demand of a candidate, when the numbers cannot be conveniently ascertained by sight. In this action an averment that the plaintiff thereby lost his office was held sufficient after verdict;

(817) *Harman v. Tappenden*, 1 East, 562.

(818) *Id.* 563. et n.

(819) *Ashby v. White*, 2 Ld. Ray. 957. *Herring v. Finch*, 2 Lev. 250.

(820) *Starling v. Turner*, 2 Lev. 50. *Ashby v. White*, 2 Ld. Ray. 955.

but it should be, that otherwise he would have been elected.

821. So it lies for taking away the paper on which an officer is keeping an account of the voters polled, when it cannot be otherwise ascertained how the majority will vote. In this case the defendant, a burgess, had caused the Corporation to assemble for the purpose of removing the plaintiff from his office of recorder, and finding the majority voting on the part of the plaintiff, he took away and destroyed the paper on which the poll was taken.

822. The different statutes giving magistrates double costs, where the plaintiff is nonsuit in actions against them, extend to corporate officers acting in the capacity of justices of the peace, but do not extend to protect their acts in a mere corporate capacity.

Indictment. 823. It is an indictable offence for aldermen to convene and conspire to elect persons to fill the vacancies in their body, contrary to the consent of the mayor, where it is necessary that the mayor preside at the election of aldermen. But the Court will not take judicial notice of the constitution of the Corporation, or that the consent of the mayor is necessary to the convening of the assembly, or his presence at the election; all these circumstances must appear on the indictment, and it is insufficient to say that according to the privileges conferred by the letters patent, there ought to be twelve aldermen, but the charter constituting that

(821) *Sir J. Shaw's Case*, 2 Mod. 228.

(822) *Herring v. Finch*, 2 Lev. 250.

(823) *R. v. Atkyns*, 3 Mod. 5. 7. S. C. 2 Show. 238. S. C. *Tremain*, 233. See vide *R. v. Soley*, 11 Mod. 117.

number must be set out.—The indictment was for a riot.

824. A criminal information will be granted against those who riotously disturb the election of the chief officer, but if it be not shown that the right of making the election is vested in the persons who are so disturbed, judgment will be arrested. Criminal information.

825. It will be granted against the individuals who, meeting under color of forming a corporate assembly, make an order and enter it in their books, stating that the assembly were sensible that A. (their late mayor,) was actuated by motives of public justice, of preserving the rights of the Corporation, and supporting the honor and credit of the chief magistrate, in conducting a prosecution for perjury, on account of which he had been found guilty of a malicious prosecution in a competent Court; for this is a libel on the administration of justice.

826. Or for corruptly combining and prostituting their office, for the purpose of the election of members of parliament or other purposes affecting the constitution, although an indictment may be the more proper proceeding.

827. Or for giving a bribe to procure the election of a particular person to be mayor, particularly if attended with an endeavour to prevent the election of another, as if the offender being the mayor, whose presence is necessary, absent himself and remove the corporate

(824) *R. v. Soley*, 11 Mod. 115.

(825) *R. v. Watson*, 2 T. R. 204.

(826) *R. v. Davie*, Doug. 589. *R. v. Dummer*, 1 Salk. 374. n.

(827) *R. v. Tiverton*, 8 Mod. 186.

books; on which account no mayor could be elected on the charter day to the great detriment of the Corporation.

828. Or for offering a bribe to a corporator to vote for a particular person to be mayor, although the bribe was refused. See the form of the information in Plympton's case.

829. It will not be granted against the members of a select body, who, on the charter day having separated for the purpose of nominating persons of whom another body is to elect one to be mayor, instead of proceeding to their duty, previously enter upon the discussion of other public business, if there have been an usage to do so for the last 150 years; for though it is a great offence against their corporate duty, it appears that there is a plausible reason for them to consider that they had a right to do so.

830. Nor against a body who have the power of amotion, for disfranchising, on the eve of an election, members who had been previously restored in obedience to a mandamus, although for the same cause as the former amotion, and although the applicants in their affidavits impute corrupt motives for election purposes; if the defendants disavow such motives, and declare that they believed the cause of amotion sufficient in point of law.

(828) *R. v. Cripland*, 11 Mod. 387. *R. v. Plympton*, 2 Ld. Ray. 1377.
R. v. Vaughan, 4 Bur. 2494.

(829) *R. v. Parkyns*, 3 B. A. 678.

(830) *R. v. Davie*, Doug. 589.

831. Nor will it be granted against the governing part of a Corporation, for mis-application of the corporate funds; for the Court of equity is the proper tribunal for the investigation of this question. Where the trust reposed in a Corporation has been abused by the governing body, by appropriating to themselves the profits of property granted them for public purposes, the proper method of proceeding is by information in chancery in the name of the attorney-general, which he will in his discretion file on the application of a member of the Corporation or other person aggrieved; upon which, if necessary, a discovery may be obtained, and the offending parties may be compelled to account.

Not for misapplication of funds.

832. The application for a criminal information is a waiver of an action for the same cause, and if granted, operates to stay civil proceedings: but the Court will in its discretion consider which is the more proper method of proceeding, and if it seem fit, refuse the information, and direct an action to be brought.

Information waiver of action.

833. Besides those cases in which the Court grants leave to file a criminal information, the attorney-general may at any time file one of his own authority; and if it include unnecessary counts, it seems that the Court cannot direct them to be struck out, but there should be an application to the attorney general for a summons to the prosecutor's attorney, to show cause why they should not be struck out, and if they appear unneces-

Information by Attorney-general.

(831) *R. v. Watson*, 2 T. R. 204. *Dummer v. Chippenham*, 14 Ves. jun. 250. *Limerick v. Attorney General*, 6 Dow. P. C. 136.

(832) *R. v. Sparrow*, 2 T. R. 198.

(833) *R. v. Green*, C. T. H. 209.

sary, it will recommend to the consideration of the attorney-general, the propriety of striking them out.

Motion for
informa-
tion.

834. A motion to show cause why a criminal information should not be filed, cannot be made on the last day of term.

(834) R. v. Davies, Say. 241.

CHAPTER VI.

CONFIRMATION.

AN existing Corporation may be confirmed in its constitution and privileges, either by act of parliament, or by acceptance of a new charter from the king, and few are the Corporations which have not in the course of their existence been confirmed by one or the other. The confirmations by statute are of two kinds : the one by a general law confirming all Corporations at that time in being : the other by a statute relating to a particular municipality. By statutes or charters usually called confirmatory, there are in general many alterations made in the pre-existing constitution, or indeed they would be almost nugatory.

I. BY STATUTE.

835. "*Civitas London habeat omnes libertates suas antiquas et consuetudines suas ; preterea volumus et concedimus quod omnes civitates aliæ et burgi, et villæ, et barones de quinque portibus, et omnes portus habeant omnes libertates et liberas consuetudines suas.*" General statutes.

836. "Auxint voet le Roi que les citées, burghs, et villes, de franchises eient leur franchises, usages, et franchises costumes selonc ce q'ils deyvent avoir et soleient."

837. A confirmation of customs by parliament, extends only to ratify such customs as were previously good.

Statutes relating to particular Corporations.

838. As to the statutes confirmatory of particular Corporations, they are not mentioned here, for they must be pleaded and relied upon as private charters. And those statutes which confer particular powers and privileges on corporate officers, are not altogether within the scope of this treatise; a few of them have been already extracted.

London.

839. The statute of Richard II. by which the customs of London are confirmed, may be found at length in the report of the case of Colchester against London; and for the statute of the second year of William and Mary, which reverses the celebrated judgment on the information in the nature of quo warranto against the city, entered in the thirty-fifth year of Charles the Second, refer to the statutes at large. It may be observed that this act is a public act throughout, and need not be pleaded, though it was argued at one time that a part only was declared a public act.

(836) 1 Ed. III. c. 2. s. 9.

(837) City of London's Case, 8 Co. 126. *Fazakerley v. Wiltshire*, 1 Str. 466.

(839) 7 R. II. c. 35. *Player v. Vere*, T. Ray. 289. *Colchester v. London*, W. Jones, 240. 2 W. & M. st. 1. c. 8. *R. v. London*, 12 Mod. 18. S. C. Skin. 294. 316.

840. The Corporations of the universities of Oxford and Cambridge were confirmed by a statute in the reign of Elizabeth, which declared that their charters should be good, effectual, and available in law, to all intents and constructions and purposes, according to the form, words, sentences and meaning of the same, as amply, fully and largely, as if the same letters patent were recited verbatim in that act of parliament: provided that the privileges and liberties of the municipal Corporations of the city and town should not be prejudiced, but continue as before.

Oxford and
Cambridge.

II. BY CHARTER.

841. By a charter of confirmation, the pre-existing constitution may be essentially altered, if it depended upon prescription or charter; but not if it were established by an act of parliament. Such alterations can be made only by express provision, or by modifications of the body politic, or new provisions inconsistent with the continuance of the ancient regulations; in all other respects the constitution continues as before.

Effect.

842. A charter of confirmation must be accepted in the same manner as an original charter of creation. Of this acceptance the doing of corporate acts in a manner conformable with its provisions, and contrary to the former rules is evidence. But if such a charter be accepted by the select classes and rejected by the freemen of the

Accept-
ance.

(840) 13 Eliz. c. 29.

(841) R. v. Barber Surgeons, 1 Ld. Ray. 585. R. v. Larwood, 1 Ld. Ray. 32. S. C. Comb. 316. R. v. Miller, 6 T. R. 277.

(842) R. v. Larwood, Comb. 316. S. C. 1 Ld. Ray. 32. S. C. Skin. 575. R. v. Wynn, 2 Barnard. 391.

former Corporation, elections in conformity with it, and the submission of the freemen for the space of thirty-five years give it no authority.

Confirma-
tion or
grant.

843. When a Corporation has accepted a new charter they may use it as a confirmation or a grant according to the nature of its provisions; it operates also in some respects as a surrender, for its effect is to confirm the constitution when unaltered, to grant new powers and franchises, and to alter or repeal those which were formerly enjoyed.

Alterations.

844. If the power of amotion were anciently vested in a select body and a new charter neither dissolve that body nor divest it of such power, nor transfer that power to any others, although that body be newly modified, the power of amotion is tacitly confirmed in them and to be exercised as before.

845. If under the ancient constitution all householders were entitled to vote except *innholders* or *drawers* at inns, and a new charter, confirming all ancient customs except where altered, declare that *no drawer* at an inn shall vote, omitting *innholders*; this does not operate to remove the disqualification of innholders, but they are still excluded by virtue of the ancient constitution.

846. If such charter confer a new franchise upon the Corporation, for which it is necessary that a public officer be constantly provided, (such as the shrievalty of Middlesex, which was conferred on the city of London,)

(843) *R. v. Larwood*, 1 *Ld. Ray.* 32. *S. C. Comb.* 316.

(844) *Haddock's Case*, *T. Ray.* 435. *R. v. Westwood*, 4 *B. C.* 795.

(845) *R. v. Abell*, 3 *D. R.* 395.

(846) *London v. Vanacre*, 12 *Mod.* 271. *S. C.* 1 *Ld. Ray.* 499.

the Corporation is bound to provide a sufficient officer, and their neglect to do so is a forfeiture of the franchise, on account of which the letters patent may be repealed by scire facias. And by accepting the charter, all the freemen of the Corporation who are capable of discharging such office, render themselves liable to undertake it, although it is to be executed beyond the limits of the Corporation.

847. After receiving a new charter, which alters the qualification of the electors, or eligible or the mode of election, an election according to the former constitution is altogether void.

848. If two sheriffs were both formerly eligible by the Corporation at large, and a new charter declared that one should be elected by the select classes, and the other by the commonalty, and the commonalty proceed to elect both, the election of the first chosen is valid, and that of the second void.

849. So if formerly burgesses might be elected from among either inhabitants or strangers, and a subsequent charter has limited the eligibility to the inhabitants, the election of a stranger is void, although the Corporation have been in the habit of electing strangers ever since acceptance of the charter.

850. So if the statute or new charter prescribe a different form of election from that anciently pursued, an election according to the former mode is void.

(848) *R. v. Larwood*, Comb. 316. S. C. 1 *Ld. Ray*. 32.

(849) *Powell v. Regem*, 3 Bro. P. C. 436.

(850) *R. v. Barber Surgeons*, 1 *Ld. Ray*. 585. *R. v. Miller*, 6 T. R. 277. *R. v. Westwood*, 4 B. C. 795.

851. The charter at times alters the period of duration of an office ; so that if a mayor had antecedently a power to hold over, being elected annually on Michaelmas day, by the mayor burgesses and common council, that power is abrogated by a new charter, confirming the constitution in all things not altered, but *abolishing* the ancient *manner* of electing, nominating and appointing the mayor, and directing that the election shall be in future by the mayor, common council, and town clerk, annually upon the twenty-fourth of September pro-uno anno integro proxime sequendo. For the former method of election being abolished, surely an incidental right under such election will be gone also. The right of election is transferred to other persons, and can there be a holding over under an election when the foundation of that holding over is gone ?

(851) *R. v. Phillips*, 1 Str. 397.

CHAPTER VII.

DISSOLUTION.

852. It has been a disputed question, whether a Corporation can be actually dissolved except by the extinction of all the people of the place, nor is it yet set at rest. It was violently agitated in the time of Charles the Second, pending the proceedings against the city of London, and has been frequently discussed since, particularly in the contest between the different parties of the Corporation of Chester. When the question has been closely pressed on the Court, they have avoided it, by finding that in the particular cases urged, the Corporation was in a state of suspension, or that the surrender of the charter was invalid for want of enrolment, or that there was an error in the proceedings against the Corporation.

The frequent use of the word Dissolution in law books is no ground for argument; for at different times it has been held in all the instances to which the expression has been applied, that the body was not *ipso facto* dissolved; and the charters granted upon such a presumption, have been either declared void, or construed to be charters of revival and confirmation, and not charters of new creation.

(852) *Case of the City of London*.—*Quo War. passim*. 2 Show. 263. 279. *Smith's Ca.* 1 Show. 278. 280. *S. C. R. v. London*, 12 Mod. 17, 18. *S. C.* 4 Mod. 58. *Dungannon Ca.* Hob. 14. *S. C.* 12 Rep. 120. *Harrison v. Williams*, 3 B. C. 162.

The different means by which Corporations have been supposed capable of dissolution are, 1. by the loss of an integral part of the Corporation, such as the mayor, the aldermen or a majority of them, or at least by the death or ouster of all the corporate officers. 2. By surrender of the franchise of being a body politic, made by the Corporation for the time being, which surrender must be accepted by the king whose acceptance is said to be manifested by causing it to be enrolled in chancery. 3. By repeal of the letters patent on proceedings in *scire facias*, founded on a supposed forfeiture of that franchise. 4. By proceedings in *quo warranto* founded on the same pretence.

As I apprehend it, the creation of a municipal Corporation is the constituting of all the people of a certain place, a body politic, for the purpose of self-government, and the enjoying certain privileges and franchises which could not otherwise be enjoyed with equal conveniency; a body which does not depend for its existence either upon the circumstance of having officers capable of administering their affairs, or the actual possession of those privileges or franchises. If this principle be correct, and it is not unwarranted by the highest authorities, a Corporation may be suspended and inert, but cannot be dissolved unless by the extinction of all, or at least by the surrender or misconduct of a majority of the people of the place. The courts have often in some measure departed from this doctrine, in treating a Corporation as consisting only of officers and freemen and not including the people of the place; but a very recent decision has, I think, fully substantiated my position. And perhaps the principles may be thus reconciled.

On the application of Williams, who was an inhabitant of Chester, but not a freeman, to obtain inspec-

tion of a by-law in which he was interested, the learned Judge who now presides in the Court of King's Bench observed, that the applicant was not to be considered as standing altogether in the situation of a stranger, but that the by-law must be taken to have been made for the public weal, and for the rule and government of persons resident and dwelling within the city.

In the case of *Dungannon* it was held, that the king might incorporate a place, and confer franchises upon it, to be exercised by a certain body to the exclusion of the rest.

Of this kind I apprehend are all incorporations of municipalities; the people of the place are both formally and virtually incorporated; certain only are admitted to the enjoyment of many franchises, fewer still are invested with offices either of pre-eminence or government, and the power of regulating their affairs; but the whole are presumed to have an interest in the grant, that of being governed by the corporate body, better than they had otherwise been, and sometimes of enjoying such privileges as the right of common. Although, then, the principal advantages might be lost by the extinction of the officers of the body politic, and almost all the rest by the extinction of those admitted to the freedom, the form of incorporation, the constitution itself still remains, and the king may by another charter empower the inhabitants to elect new officers, and admit another race of freemen, or may himself appoint them either by nomination or prescribing certain qualifications, without reincorporating the people of the place. Many opinions thrown out by the judges at different times are contrary to this doctrine, but the decisions are in support of it, and though impeached, they have not been overruled.

I. BY LOSS OF AN INTEGRAL PART.

Chief officer.

853. A Corporation was considered to be dissolved, by the omission to elect the mayor on the day appointed by the constitution, in cases where the former had no right to hold over, because there remained in the body no power of afterwards electing one. It was also observed, that it might be dissolved where the mayor died between the day of his election and that at which his office would expire, if the charter had not provided for a new election on that event; but I apprehend the authority of this observation is very weak, for at the utmost it could only amount to a suspension, until the next charter day. The first case is now provided against by a statute which expressly declares that no Corporation shall be dissolved or disabled from electing such officer on that account.

854. The statute goes further, and with a retrospective view provides that "no Corporation shall be deemed or adjudged to be dissolved or disabled *from electing* a mayor, bailiff or bailiffs, or other chief officer or officers by reason of any omission or default *which hath already happened* in not nominating electing or swearing a mayor bailiff or bailiffs or other chief officer or officers of such corporation, upon the day or within the time limited for such nomination, election or swearing by the charter or usage of such corporation, or by reason of the absence of the mayor, bailiff or bailiffs, or other chief officer or officers who ought to have presided at the assembly for such nomination, election or swearing, or by reason of

(853) 11 Geo. I. c. 4. s. 1. V. tit. 531. Banbury Ca. 10 Mod. 346. R. v. Pasmore, 3 T. R. 245.

(854) 11 Geo. I. c. 4. s. 7.

such election having become void as aforesaid, but every such corporation shall be adjudged, deemed and taken to *be and to have been* subsisting and capable of electing such officer or officers, to all intents and purposes, any such omission, absence, default or avoidance, or any defect, disability or forfeiture, arising therefrom, in any wise notwithstanding."

855 "Provided that nothing herein contained shall extend or be construed to extend to invalidate or make void any charter heretofore granted to and accepted by any city borough or town corporate, or any Corporation within the same or any of them, or any elections or acts had made or done in pursuance of any such charter."

856. A corporation is said to be dissolved by the loss of all or the majority of the members of any integral part, without which it cannot transact its municipal business, unless the subsisting parts have vested in them a power of restoring it.—As if the Corporation be constituted of mayor, eleven other aldermen and burgesses, the election of the mayor to be made by the mayor, aldermen and burgesses; if none of the aldermen remain, or only five, the Corporation is dissolved; unless the mayor and burgesses possess the power of electing aldermen without the interference of aldermen.

Aldermen,
&c.

857. This has been called dissolution, but it should be observed that in no one of the cases where it has been so called, was the corporation in the state described. It may be well therefore to point out the effect

What is dis-
solution.

(855) 11 Geo. I c. 4. s. 8.

(856) Colchester v. Seaber, 3 Bur. 1870. S. C. 1 W. B. 591. R. v. Pasmore, 3 T. R. 241. R. v. Miller, 6 T. R. 278. R. v. Morris, 3 East, 216. S. N. 4 East, 26.

of an actual dissolution, and the effect of a corporation being reduced to this state.

Extinction.

858. If a Corporation be dissolved, its property does not *escheat* to the crown, but *reverts* to the private donors. If a prescriptive corporation be dissolved, a new corporation established in its place, although endowed with all its powers, privileges, immunities and property, cannot claim by the *prescription* of the former body. If a Corporation be once dissolved, though a new one be founded of the same name, and all the possessions be granted to them, yet *homage ancestral* is gone. The franchise, to be a Corporation, can subsist only in the persons to whom it is granted, and cannot merge in the crown, therefore on a dissolution of the body politic, they must ipso facto determine. From these observations it is clear that a Corporation actually dissolved is incapable of revival.

Suspension.

859. When the case of a Corporation in a defective state, has been before the Court, the term *suspension* has been used instead of dissolution, and its state has been thus described. The Corporation still subsists; the remaining members still enjoy the right of voting in the election of members of parliament; they still enjoy the right of common: and the crown may appoint a new set of officers and revive their activity, without granting them new powers or reincorporating them. They may even be revived by a different name, without words of

(858) Knight v. Wells, 1 Lut. 519. Attorney General v. Lord Gower, 9 Mod. 226. Windsor v. Webb, God. 211. Whitton v. Westren, W. Jon. 190. Chest. Ca. 567. R. v. Stratford on Avon, 14 East, 360. 1 Rol. Abr. 816. p. 2, 3. Co. Lit. 13. b. 102. b. Treby, Quo War. 13. R. v. Saunders, 3 East, 119. V. tit. 4.

(859) V. tit. 863. R. v. London, 1 Show. 278. 280. Colchester v. Seaber, 3 Bur. 1870. S. C. 1 W. B. 591. Scarborough v. Butler, 3 Lev. 237.

incorporation, continuing to be the same body politic, possessed of all their ancient rights and franchises, liable to all their ancient duties and obligations, and may be endowed with new privileges by such charter of revival, in the same manner as if such privileges had been granted to a Corporation in the plenitude of its power. It was said that the statute of George was passed only through jealousy of the authority which existed in the king to revive by appointing new officers.

860. Contrary to this however, it was held that where a Corporation is suspended, the personal privileges of its members are extinguished, and its property and franchises vested in the crown. But that the franchises created by the crown do not merge in it or become extinguished, but may be regranted to a new body of men.

II. BY SURRENDER.

861. It has been said that a Corporation may sur- May be.
render the franchise of being a Corporation, and the argument is deduced from the principle that a contract may be released by the same authority by which it was formed. So that, as the grant and acceptance of a charter is sufficient to create a Corporation, the surrender and acceptance of a charter is sufficient to destroy it. If we can presume the assent of the majority of the freemen and people of the place, to such a surrender

(860) *R. v. Pasmore*, 3 T. R. 241. 244. *Strata Marcella*, 9 Co. 25. b.

(861) *R. v. Miller*, 6 T. R. 277. *R. v. Haythorne*, 5 B. C. 412. 425. *R. v. Grey*, 8 Mod. 361. *Butler v. Palmer*, 1 Salk. 191. *Newling v. Francis*, 3 T. R. 190. 196. *R. v. Holland*, 2 East, 72. *R. v. Osbourne*, 4 East, 335. *Quo War. Postsc.*

Contra.

Insufficient
surrender.

it may be very difficult to maintain the contrary opinion. But I apprehend that very strong evidence would be required, were a surrender now relied upon in a case where the Corporation have not received nearly equal advantages from a new charter founded upon it.—It is clear that a Corporation created or confirmed by statute, cannot surrender their franchise. And it has been held that a Corporation by charter, cannot surrender the franchise of being a Corporation, for that otherwise an act of parliament would not have been necessary to legalize the surrenders of the religious houses in the reign of Henry the Eighth. But the Court in most cases appear to have assumed the contrary; and held the surrenders relied upon ineffectual for want of enrolment.

Wrong
name.

862. If a Corporation consisting of mayor, aldermen and burgesses, surrender their charter, by the name of mayor, aldermen and *capital burgesses*, it is void.

Effect on
rights of
others.

863. "In the case of the town of Nottingham, it appeared that at the common-council of the said town, it was ordered that there should be a surrender made of the charter to the king, and thereupon the mayor pursuant to the said order, did take out of the town chest the said order (charter) and surrendered the same accordingly; and so it fell out, that in the said charter was contained not only the franchise of the Corporation, but also the grant of certain common to the inhabitants, and because the surrender was against the minds of a great number of the inhabitants, who were discontented and were opposers of the present government of the kingdom, they took advantage of this omission and exhibited an information into B. R. and de-

(862) R. v. Bridgewater, 11 Mod. 291.

(863) T. Ray. 482.

sired the master of the crown office (in whose name the information was exhibited) to file it, but in *regard it was matter of state*, and of great concern, he this term desired the directions of the Court, who ordered that the attorney-general should be made acquainted therewith, who at another day appeared and refused to *meddle* therewith, and so it was left to Mr. Astry to file or not to file at his discretion, for the *Court would not* use any compulsory means for filing it, in regard they could not know whether such an information was necessary or no; and it is properly the office of the king's attorney to manage informations of such concernment."

III. SCIRE FACIAS.

864. If a charter have been originally granted upon an erroneous consideration, or if it be injurious to the public, or otherwise voidable, either in toto or in certain parts only; it may be repealed entirely or as to the voidable parts only, without affecting the remainder, by proceedings in scire facias. But when it is absolutely void, this process is unnecessary, for though unrepealed, such a charter affords no protection to one acting under it, against an action for any injury which he has done another.

To repeal
charter,
voidable.

865. But when facts are stated as the consideration of the charter, it will not be repealed because a conclusion has been drawn from them erroneous in point of law.

When not.

(864) Sackville College Ca. T. Ray. 178. Butler's Ca. 2 Vent. 344.
R. v. Pasmore, 3 T. R. 244. 2 Chest. Ca. 556.
(865) R. v. Pasmore, 3 T. R. 242. 245.

866. Nor will it be avoided, because it refers to a preceding charter as valid, when in fact it is void, if it be not founded upon such charter.

For forfeiture.

867. If a charter conferring a franchise be granted upon a condition implied in the nature of the grant, which the Corporation has neglected to perform to the public inconvenience, it may be repealed by *scire facias*.

868. And it has been said that if a legal existing Corporation abuse the powers confided to it, this amounts to a forfeiture of the charter, and it may be repealed by *scire facias*, which is the only way of taking advantage of it: but that this proceeding is unnecessary where the Corporation is actually dissolved.

IV. BY QUO WARRANTO.

869. In the time of Charles the Second judgments (some final and some merely on default) were given against several Corporations on proceedings in *quo warranto*, under which they were assumed to be dissolved. And the ground on which this assumption was based was, that the misconduct of the *officers* amounted to a forfeiture of the franchise, on account of which the Corporation ceased to exist, and therefore they were liable to be punished for acting as a Corporation.

(866) *R. v. Haythorne*, 5 B. C. 426.

(867) *London v. Vanacre*, 12 Mod. 271. S. C. 1 Ld. Ray. 499.

(868) *R. v. Pasmore*, 3 T. R. 244. *Smith's Ca.* 4 Mod. 57. *R. v. Wynn*, 2 Barnard. 391.

(869) *Tailors of Ipswich*, 1 Rol. 5. *R. v. Grosvenor*, 7 Mod. 199. *Sir J. Smith's Ca.* 4 Mod. 55, 58. S. C. 12 Mod. 17, 18. S. C. *Skin*. 311. S. C. 1 Show. 278, 280. *R. v. Saunders*, 3 East, 119. *Treby. Quo War.* 13.

Others argued that on such a forfeiture, although the franchise were forfeited, the body continued to be a Corporation, but liable to be dissolved by judgment in this proceeding, which might be that the franchise should be seized as forfeited. Were the former opinion correct, it had been necessary to file the information against the individuals nominatim, and this ought to have been a criminal information, and not an information in the nature of *quo warranto*, for that of necessity assumes the existence of the Corporation, but asserts that the possessors have no right to hold offices in it. But in confidence of the latter opinion, the informations were in the nature of *quo warranto*, and against the body by its corporate name; so that the judgment had this absurdity in it—by in effect declaring that the *Corporation* had forfeited *its* right to be a Corporation, and that it should be seized into the king's hands, which was impossible; for a Corporation, as a Corporation, cannot commit a forfeiture: it is merely the franchise of others, and could not be seized by the king, for he could not be the Corporation. Supposing a Corporation can be forfeited, either by the misconduct of its officers or of all the members, but that by such forfeiture it is not *ipso facto* extinct, whatever proceeding is pursued to destroy it must be against that body of people on whom the franchise was bestowed; therefore proceedings against the mayor, aldermen and common-council (or even commonalty) had been illegal; they must have been instituted against the citizens and inhabitants of the place, for on them the right to be a Corporation was originally conferred, though they are not all admitted to the place of freemen.

If indeed a Corporation usurp a liberty (that is, supposing a liberty granted to it has been forfeited by its abuse or non-performance of the condition on which it

was granted, and supposing such forfeiture ipso facto determines its right to enjoy such liberty,) quo warranto may be brought against the body in its corporate name, and the liberty may be seized on judgment; but this in no manner affects the existence of the Corporation, it only deprives them of the particular franchise which they have abused, and though stript of all its franchises the Corporation still subsists. The effect of a judgment on default in quo warranto has been declared not to cause a dissolution of the body politic, and will be mentioned under that title.

CHAPTER VIII.

REVIVAL.

870. A Corporation which has been suspended may be revived by the Crown in another form or name, and this may be by words of confirmation only, without words of grant. But if a Corporation have been actually dissolved and extinct, it can never be revived; the charter must create a new corporation by words implying incorporation. When by charter.

871. It may be revived as well by a general proclamation under the great seal, including all Corporations in a similar state of inertness, although not mentioned by name, as by a particular charter: for that is as it were a special charter, to each of those Corporations, whose members choose to resume their places, and act under it, doing which is an acceptance of the grant, and sufficient although others within its terms do not accept it. The proclamation relied upon in this case, appears to me to have been a nullity in law, although in fact it may have caused those to assert their rights, who would otherwise have permitted the temporary usurpations to have continued; for if the judgments, had dissolved the Corporations, they were incapable of revival; and considering them not to have dissolved the By proclamation.

(870) *Colchester v. Seaber*, 3 Bur. 1870. S. C. 1 W. B. 591. *R. v. Pasmore*, 3 T. R. 242. *R. v. Amery*, 2 T. R. 569.

(871) *R. v. Pasmore*, 3 T. R. 192. 197. 241.

Corporations, as the fact was, they continued to be legal subsisting bodies, and the officers had an equal right to resume their places, although the proclamation had never issued.

Re-grant of
surrender-
ed fran-
chises.

872. If a Corporation have been surrendered, it may be revived by a charter restoring, granting and confirming the liberties of the former, although it do not profess to reincorporate the place. The meaning of this seems to be that the Corporation cannot destroy itself, but continues although it have surrendered all its franchises, which the crown may restore.

Effect of
revival.

873. By the revival of a Corporation, all their former rights and franchises are revived, and may be asserted in the name conferred by the new charter; the king may at the same time confer upon them new rights and franchises.

In what
persons.

874. The king may revive the former body, with the same officers and members as before, bestowing only upon them the powers of action which had failed; or he may revive it with those officers and the addition of others, or may omit the former officers, and appoint new men to fill all the offices. In whatever form revived, the charter must be accepted by a proper majority of those appointed by it, and it is unimportant that all the original members refuse to receive it.

When there
cannot be a
revival.

875. It was held that if a Corporation be dissolved and the crown create another in its place, it cannot

(872) R. v. Grey, 8 Mod. 361, 362.

(873) R. v. Pasmore, 3 T. R. 241.

(874) R. v. Pasmore, 3 T. R. 244, 247.

(875) R. v. Amery, 2 T. R. 569. 2 Chest. Ca. 556.

afterwards revive the former during the existence of the second.—If dissolution be used to signify extinction, the first can never be revived; if it be used to signify suspension, it seems that the grant to a new body of men operates as a revival of the former Corporation; so that in fact there is no new Corporation created, though the charter be in the form of an incorporation. It is universally admitted that there cannot be two distinct Corporations, created in the same place, with the same rights, property and privileges, and with similar powers.

876. While judgments in quo warranto have been standing against Corporations, it has been the practice for the king to appoint a custos of the franchises, whose authority ipso facto determines upon a restoration of the body politic, by reversal of the judgment, or a pardon of the offences. This implies that the Corporation continues to exist. In the case of London, judgment was given in the long vacation after Trinity term of 35 Charles the Second, and in the following term the king appointed Sir Henry Tulse to be mayor of "London being in his hands by force of the judgment in quo warranto, to hold the office at the king's pleasure." And the mayor appointed an attorney in the King's Bench, thus "The mayor of the city of London has placed and appointed"—the appointment was anciently in the corporate name—"the mayor, commonalty and citizens appoint."—

Custos of corporate franchises during seizure.

877. "It was resolved by the Court, that if there be an old charter surrendered, but the surrender is not en-

Void charter.

(876) Mayor of London by commission, 2 Show. 314. Quo War. passim. 2 Chest. Ca. 567.

(877) Bully v. Palmer, 12 Mod. 247. S. C. Butler v. Palmer, Salk. 190.

rolled, and a new charter in consideration of the surrender granted, that the second charter is void ; and if there be any other persons in the new charter than were in the old, any law made by them is void, because they act under a void charter ; but secus, if it be the same members in the old charter, because then they act by their first charter, which is still good. So if in the first case they had given a bond, and put the seal of the new Corporation to it, it would be void. But if the members of the old charter had gone to election, and some by color of the new charter had voted with them against their will, their choice by majority of the old charter with some mentioned in the new, is good."

PART II.



CHAPTER I.

CORPORATE DOCUMENTS.

I. EVIDENCE.

1. CORPORATE documents are of two kinds, those **Public.** which are the records of the municipality, relating only to the members of the body politic and persons under its government, which are of a public nature, and evidence in all questions among themselves, and also in questions of a public right, as that of swearing and admitting freemen; and those of the other kind which relate **Private.** to the corporate rights in respect of strangers, and are as much private writings as the title-deeds of any individual.

2. When Corporation books have been kept publicly **What are public.** as such, entries made in them by the proper officer have been generally admitted to be given in evidence. And of similar authority are entries made by another proper person during the sickness of the officer, or on his refusal to attend; but in the latter case, the reason why they were not made by the officer ought to be shown.

(1) *London v. Lynn*, 1 H. Bl. 214. c. *Marriage v. Lawrence*, 3 B. A. 144. *R. v. Debenham*, 2 B. A. 187. *Gibbon's Ca.* 17 How. St. Tr. 810. *Moore's Ca.* 17 How. St. Tr. 854.

(2) *R. v. Mothersell*, 1 Str. 93.

Authenti-
cated.

3. Whoever produces the book must establish its authority before he delivers it in, and may be required to show where it has been kept, and how it came to his possession.

What not
public.

4. A book containing minutes of some corporate acts which occurred ten years ago, entirely written by the relator's clerk, who was not an officer of the Corporation, and appearing never to have been kept among, or esteemed as one of the corporate documents, or even seen before the present application for an information, is not admissible as a corporate document.

5. Nor is the copy of a letter made 50 years ago, and found in the Corporation chest; but the original must be first accounted for, as though it had been found in the possession of a private person.

6. Nor are entries of a private nature in the public books of a Corporation, evidence for them in support of a right which they claim, for this were allowing the party to fabricate evidence for themselves.

Copies of
public, evi-
dence.

7. Where the original document is of a public nature, and would be evidence if produced, it is not necessary to show the document itself, for it may be required in many places at the same time; for that reason an immediate sworn copy made by the proper officer will be admitted.

(3) *R. v. Mothersell*, 1 Str. 93. *R. v. Thetford*, 12 Vin. Abr. 90. p. 16.

(4) *R. v. Mothersell*, 1 Str. 93.

(5) *R. v. Gwyn*, 1 Str. 401.

(6) *R. v. Debenham*, 2 B. A. 187. *Marriage v. Lawrence*, 3 B. A. 144.

(7) *R. v. Lord George Gordon*, Doug. 593. (3). 1 Phil. Evid. 405.

II. CUSTODY.

8. The custody of corporate documents belongs more particularly to the chief officer, but they ought to be kept in the usual depository, which should be in the Guildhall. If other persons have access to the public depository, and some one having taken away, injured, or attempted to injure any of the documents, the mayor has on that account removed them into his private custody, the Court will not compel him to replace them in the public place, until provision has been made for their security against the recurrence of similar mischief.

Of chief officer.

9. If the custody of their documents belong to one of their officers in virtue of his office, the Corporation cannot compel him to deliver them up, but may require that he submit them to their inspection whenever they think proper.

Of recorder, &c.

10. Sometimes the custody of these documents is entrusted to the town clerk or other officer, merely as the servant of the Corporation, in which case they may appoint another to receive them, and if they are not delivered over after demand, the Corporation may obtain possession of them by an action of detinue, or the Court will compel a delivery by mandamus.

Ministerial officer.

11. If the predecessor in office, or he being dead his personal representative, or another person having pos-

Mandamus to obtain.

(8) R. v. Figram, 2 Bur. 767. S. C. R. v. Rye, 2 Kenyon, 486.

(9) R. v. Ipswich, 2 Ld. Ray. 1238.

(10) *Id. ibid.*

(11) R. v. Nottingham, 1 Sid. 31. Anon. 1 Barnard. 402.

session of corporate documents under him, refuse to deliver them over to the successor or the Corporation on a proper application, the Court will grant a mandamus to compel him to do so.

12. A mandamus will be granted to compel either a stranger or corporator in possession of corporate documents to restore them, although they have been deposited with him as a security for money which he has laid out on their account; but if he rely upon this as a reason for detaining them, he may return it to the writ and try its sufficiency. Perhaps under these circumstances the interference of the Court was uncalled-for, the Corporation ought to have been left to obtain possession of their books by an action of detinue; and the granting the writ in this instance is a departure from the general principle, which is to deny it wherever there is another adequate legal remedy. But the ground on which it was granted is, that they were public books, and ought not to be in the private custody of any one.

III. PRODUCTION.

When officer has neglected for corporate use.

13. If the officer who has the custody of corporate books have refused or neglected to produce them at former meetings, where they ought to have been produced for the purpose of making entries of elections and admissions of new members, the Court will grant a mandamus to compel him to produce them at the next meeting for that purpose; although if he fail in doing so, the Corporation may provide other books and

(12) *R. v. Ingram*, 1 W. B. 50.

(13) *Anon.* 2 Barnard. 235. *R. v. Mothersell*, 1 Str. 93.

make such entries in them, which on an explanation of the circumstances, are equally admissible in evidence with entries in the old books.

14. Upon an affidavit that there are razures, obliterations or interlineations, in certain corporate documents which are necessary to be given in evidence, instead of granting a rule for copies, the Court will make a rule on the officer who has the custody of them, to attend on the trial at the expence of the applicant, and produce the particular documents in which the affidavits positively allege that there are such razures, obliterations or interlineations, but not any others. This rule is absolute in the first instance to avoid delay, and is granted as being a more effectual method of compelling a refractory officer's attendance than a subpoena.

At trial, on account of razures, &c.

IV. INSPECTION.

15. Every corporator has, as such, an interest in the documents of the Corporation, and a general right to inspect them upon all proper occasions, and if upon application for that purpose, the officer who has the custody refuse to shew them, the Court will grant a mandamus to enforce his right.

Corporators' right by mandamus.

16. One who has a prima facie title to a corporate office has a right to inspect such documents as relate to that

(14) Anon. 1 Barnard. 430. R. v. Shrewsbury, 2 Barnard, 317. Anon. 2 Barnard. 340. R. v. Bedell, Say. 76.

(15) R. v. Newcastle, 2 Str. 1223. et n. R. v. Shelley, 3 T. R. 142. R. v. Babb, 3 T. R. 580. R. v. Tower, 4 M. S. 162. Rogers v. Jones, 5 D. R. 484. R. v. Travannion, 2 Chit. Rep. 366. n. R. v. Chester, 1 Chit. Rep. 476, 477. n. 479.

(16) R. v. Newcastle, 2 Str. 1223. R. v. Lucas, 10 East, 235.

title; and may obtain a mandamus for this purpose before any suit has been instituted.

17. A corporator has a right to inspect these documents, to obtain information as to his rights, whether in a dispute with a foreigner, or the Corporation itself, or any of its members.

Under statute.

18. "The mayor, bailiff, sheriff, town-clerk or other officer of any Corporation, having the custody of or power over the records of the same, shall upon the demand of any person being an officer or member of such Corporation, on the payment of one shilling, permit such person on any day or days except Christmas day, Good Friday and Sunday, between the hours of nine in the morning and three in the afternoon, to inspect the books and papers wherein the *admission* or swearing in of the freemen, burgesses or other members or officers of such Corporation, shall be entered, and to have copies or minutes of the admission, or the entry of swearing in of any one or more of such freemen, burgesses or other members or officers, upon paying sixpence for every one hundred words, for writing the same. And if such mayor, bailiff, sheriff, town clerk or other officer shall refuse or deny to any person hereby entitled to demand it, the inspection of such books or papers, or to have copies or minutes thereof as aforesaid, such mayor, bailiff, sheriff, town clerk or other officer shall for every such offence forfeit and pay the sum of 100*l.* together with full costs of suit to him her or them who shall inform and sue for the same within one year after such offence committed, by action of debt, bill, plaint or information," &c.

(17) *Edwards v. Vesey*, C. T. H. 128. *R. v. Babb*, 3 T. R. 580.

(18) 32 Geo. III. c. 58. s. 4.

19. This does not entitle such persons to an inspection of the *orders or appointments* for the admission or swearing in; it is confined to the *entries of the admission*, or swearing in, and being a penal statute cannot be extended by equitable construction.

20. Under a former statute, of which this is an extension, a joint action may be sustained against one bailiff and the town clerk, for if both refuse, the offence may be joint; but if there be two bailiffs, of whom one only refuses, the other being an unoffending party must not be joined.

21. When the corporator's application to inspect is founded on his general right, he has a mandamus; but when it is founded on a suit pending, he obtains a rule.

22. A party to a suit who has not a general interest in the Corporation, and therefore at other times, no right to inspect their documents, may acquire a right of inspecting them for the purpose of the particular proceeding. When this is the case, as well as when a corporator is engaged in an action in which the evidence of such documents may be material, the Court will make a rule upon the officer who has the custody to grant an inspection, and copies of such parts of the corporate writings as relate to the matter in dispute; but the rule will in no case be extended beyond the

Right of party to suit, whether corporators or others.

By rule.

Extent of.

(19) *Davies v. Humphreys*, 3 M. S. 228.

(20) 3 Geo. III. c. 15, s. 4. *Schuldham v. Burmis*, Cowp. 196.

(21) *Tidd's Prac.* 649. *R. v. Shelley*, 3 T. R. 142.

(22) *R. v. Newcastle*, 2 Str. 1223. *R. v. Babb*, 3 T. R. 580, 581. *Southampton v. Greaves*, 8 T. R. 592. *R. v. Shelley*, 3 T. R. 142. *Bateman v. Phillips*, 4 Taunt. 162. *R. v. Chester*, 1 Chit. Rep. 476, 477, n. 479. *R. v. Travannion*, 2 Chit. Rep. 366, n.

particular documents referring to the point in litigation. And in this respect it is immaterial whether the application be made on behalf of a Corporator or another person.

Right of
foreigner.

23. This rule will be granted on the application of a resident foreigner, against whom the Corporation has commenced an action to recover the penalty of a by-law for trading within the limits of the municipality, in violation of the privileges of the Corporation; but the grant of inspection and copies will be restrained to the by-laws relating to the exclusion of foreigners.

Common
relator.

24. A similar rule will be granted to a common relator, on an information in the nature of quo warranto, although he is not a member of the Corporation, and has no interest in the event of the proceedings.

Of stran-
gers.

25. But in proceedings between a Corporation and a mere stranger, as where the Corporation proceeds to enforce its right to a toll, the Court will not grant the stranger a rule to inspect the corporate documents; for between such parties, the writings of the Corporation are as much private writings and their private muni- cements of title as those of any individual. The rule will not be granted even in those cases where a Court of equity would decree an inspection of the deeds of a private person, for were the common law courts to assume the power of so doing, in these instances they might with equal propriety assume it in questions between individuals. And when Courts of equity grant such an

(23) *Harrison v. Williams*, 4 D. R. 823. S. C. 3 B. C. 163.

(24) *R. v. Bell*, 1 Barnard. 373.

(25) *Atherford v. Beard*, 2 T. R. 615, 616. *Southampton v. Greaves*, 8 T. R. 592. *Hodges v. Atkis*, 3 Wils. 398. *Anon.* 2 Vez. 621.

inspection, they may adapt their rules to the particular case in the manner best calculated to attain the ends of justice; whereas if the King's Bench were to grant an inspection of title-deeds, it must be a general rule framed to embrace all cases.

26. This rule will not be granted on an information against a corporator or perhaps another person for bribery at an election, or other offence against the law of the land, either for the purpose of furnishing evidence of the offence, or showing that a witness against him is a freeman of the Corporation.

27. On proceedings in mandamus, a rule to inspect is not granted until a return has been made, and when the return has been allowed, the cause is at an end, and the rule expires of course; but if an action be brought for a false return, a new rule will be granted. Therefore on mandamus to admit a mayor, the defendant (the mayor in possession of the office) is not entitled to a rule to inspect for the purpose of preparing his return to the writ, and showing that the applicant is not elected; but if he return not elected, and an action be brought against him upon that return, he shall have a rule to inspect, and a copy of the charter if it is not enrolled.

Rule, when
granted in
mandamus.

28. The former practice in proceedings on the information in the nature of quo warranto, was to grant a

When in
quo war-
ranto.

(26) *R. v. Purnell*, 1 W. B. 45. *R. v. Heydon*, 1 W. B. 351.

(27) *Anon.* 2 Salk. 430. *Anon.* 1 Barnard. 26. *R. v. Surry*, Say. 145. *R. v. Nottingham*, 1 W. B. 59.

(28) *Anon.* 1 Barnard. 26. *R. v. Bell*, 1 Barnard. 373. *R. v. Hollister*, C. T. H. 245. *R. v. Nottingham*, 1 W. B. 59. *R. v. Surry*, Say. 145. *R. v. Stacey*, 1 T. R. 2, 3. *R. v. Shelley*, 3 T. R. 142. *R. v. Babb*, 3 T. R. 581.

rule to inspect, on granting the rule to show cause why the information should not be awarded, when the relator was a corporator, and had an interest in the question; and not to grant it until the rule was made absolute, when applied for by a common relator. But in a more recent case, it was said that there is no good reason why the rule to inspect should be granted before the rule for the information had been made absolute.

Motion,
how made.

29. The motion for a rule to inspect and have copies, must be supported by affidavits detailing the circumstances on which the claim is founded, and showing that an application has been made to the proper officer for the same purpose, and that he has refused to comply with it. The rule will be granted absolute in the first instance, when the application is made in the proper stage of the proceedings on a writ of mandamus or information in the nature of quo warranto.

Copy of
charter re-
fused.

30. If the charter has been enrolled, copies of it may be obtained by application to the office of the Rolls, and the Court will not grant a rule on the corporate officer, to permit an inspection or furnish a copy of it; but if it have not been enrolled, upon an affidavit of this fact, the Court will grant a rule upon an officer who has it in his custody.

Poll books.

31. A poll book in which the names of the electors of the mayor or aldermen are registered, is a book

(29) *Roe v. Aylmer*, Barnes, 236. *R. v. Shelley*, 3 T.R. 142. *R. v. Travannion*, 2 Chit. Rep. 366. Tidd's Prac. 649.

(30) *R. v. Tucker*, 1 Barnard. 28. *R. v. Amery*, 1 T.R. 150. Contra, Anon. 2 Salk. 430.

(31) *R. v. Hughes*, 1 Barnard. 41. *Acherley v. Bell*, 2 Barnard. 64. *S. C. Atesley v. Bell*, Id. 114.

of a public nature, and when necessary a rule will be granted to inspect it. But the rule must direct an inspection of that book in particular, for under a general rule to inspect or have a copy of all the public books, the person who has obtained it is not entitled to an inspection or copy of such a poll book.

32. The rule requires that the expence attending obedience shall be borne by the person who obtains it, and also allows the officer a remuneration for his trouble.

At applicant's expence.

33. If the officer disobey the rule to allow an inspection, and give copies of, or to produce corporate documents, the Court will grant an attachment against him; but not if he swears he neither has them in his custody, nor knows in whose possession they are; nor if there be a fair doubt whether the books fall within the terms of the rule.

Disobedience to rule.

(33) *R. v. Hughes*, 1 Barnard. 41. *R. v. John*, 8 Mod. 134.

CHAPTER II.

MANDAMUS.

Its nature.

34. The writ of mandamus is a prerogative writ, by which the Court of King's Bench exercises its supreme jurisdiction over all public bodies and officers in the administration of justice, when the law has not provided another specific and adequate remedy. It has been peculiarly applied to the regulation of Corporations, for the purpose of compelling them to observe the ordinances of their constitution, and to respect the rights of those who are entitled to participate in their privileges. It is not intended to offer a general treatise upon this writ, but to speak of it only as it is applicable to corporate purposes.

Runs into exclusive jurisdictions.

35. It is a prerogative writ, and runs into exclusive jurisdictions, in the same manner as the writ of habeas corpus; it runs therefore into the palatinates, the city of London, the cinque ports, and ancient towns, notwithstanding their peculiar privileges.

(34) *Awdley v. Joy*, Poph. 176.

(35) *R. v. Commissioners of Excise*, 2 T. R. 385. *R. v. Winchelsea*, 2 Lev. 86.

SECTION I.

APPLICATION FOR THE WRIT.

36. The writ of mandamus is not granted of course, but upon motion founded upon affidavits, which must be drawn up in a manner so certain and formal that an indictment for perjury may be sustained upon them, if the averments be wilfully false. How obtained

37. Where then the Corporation is by prescription, the constitution of it as well as the party's right, must be verified by affidavit. Where it is by charter, a copy of it must be produced at the time of making the motion.

38. If the affidavits be sworn in Court, or before a judge at chambers, they need not be entitled in the King's Bench. But if sworn before a commissioner, they must be entitled of the Court, unless it say before A. B. a commissioner "of the Court of King's Bench."

39. The affidavits must show a case in which the writ lies, and some grounds for the application, although both parties are equally willing to have the question tried.

(36) *R. v. Chester*, 1 T. R. 403. *R. v. London*, 1 T. R. 425. *R. v. Ely*, 2 T. R. 336. *Anon.* 2 Barnard. 237.

(37) *Bul. N. P.* 200. *Selw. N. P.* 1076.

(38) *R. v. Hare*, 13 East, 189.

(39) *R. v. Bishop of London*, 1 T. R. 333.

For what
rights.

40. It is granted to enforce public rights, and to compel officers to do their duty, although they are otherwise liable to penalties for neglect of it; but it is not granted in aid of rights and claims of a mere private character.

Defect of
other re-
medy.

41. The writ of mandamus will be granted only where there is a specific legal right, and no other specific legal remedy adequate to enforce that right. Therefore where there is such a legal right, it will not be refused merely because there is a remedy in equity, or because there is a specific remedy at law, if not adequate to its purpose; and where there is a fair doubt whether the writ ought to issue, it will be granted, for the question may be disputed on the return.

42. But where there is another specific and adequate legal remedy, the writ of mandamus will not be granted. It will not for this reason issue to put a claimant in possession of an office, for which he may maintain a writ of assize, nor to restore to an office of profit, unless a strong reason be shown; the claimant may try his right in an action to recover the mean profits against the person in possession: nor will it be granted for a corporator who is not disfranchised, but merely excluded from participating in the profits of the corporate property, for he has another remedy.

(40) *R. v. Everet*, C. T. H. 261. *R. v. Bank of England*, 2 B. A. 622.

(41) *R. v. Dean and Chapter of Dublin*, 1 Str. 538. *R. v. Owen*, Comb. 399. *R. v. Windham*, Cowp. 378. *R. v. Barker*, 1 W. E. 352. *R. v. Marquis of Stafford*, 3 T. R. 651. *R. v. Canterbury (Archbp.)*, 8 East, 219. *R. v. Margate (Comp.)*, 3 B. A. 224. *R. v. Haythorne*, 5 B. C. 422. 429. *R. v. Severn and Wye Comp.* 2 B. A. 646. *R. v. Dean (Inclosure)*, 2 M. S. 80. *R. v. Ward, Fitzgib.* 124. *Middleton's Case*, 1 Sid. 169.

(42) *R. v. Westminster*, Comb. 244. *R. v. Jotham*, 3 T. R. 575. *R. v. Whitstable*, 7 East, 353.

43. If there be another remedy in its nature specific and apparently adequate, the affidavits must show that it would prove wholly ineffectual.

Inefficiency of other remedy must be shown.

44. Where the application is to enforce the right of an individual, the affidavits must show in him a *prima facie* title, that he has complied with all forms necessary to constitute his right, and that he has previously applied to the defendants to do that which he requires the Court to command the performance of, and their refusal or neglect.

I. TO ELECT.

45. The Court will grant a mandamus to proceed to an election of a new mayor, at any time after the charter day has passed without such election, where the former mayor having power to do so, holds over, and refuses to convoke an assembly for that purpose, unless the charter restrain the right of electing to a particular time.

Mayor after charter day.

46. The writ will be granted to compel the mayor to discharge any part of his duty as presiding officer, after he has been guilty of a default in the performance of it.

47. It will be granted to command the Corporation to proceed to an election of members to supply vacant

Members of a definite class.

(43) *R. v. Margate* (Comp.) 3 B. A. 224.

(44) *Amherst's Ca.* T. Ray. 214. *R. v. Chester*, 1 T. R. 403. *R. v. Ely*, 2 T. R. 334. *R. v. Jotham*, 3 T. R. 577. B. N. P. 199.

(45) *R. v. Cambridge*, 4 Bur. 2011. *R. v. Tregony*, 8 Mod. 113. 127.

(46) *R. v. Everet*, C. T. H. 261. *R. v. Williams*, 2 M. S. 144.

(47) *Anon.* 2 Barnard. 236. *R. v. Grampound*, 6 T. R. 302. *R. v. Fowey*, 2 B. C. 596. S. C. 4 D. R. 139.

cies in a *definite* integral class, after a reasonable time has expired from the period of their occurrence, during which they have neglected to fill them up. And where it has been the usage to fill up such vacancies on the charter day after their happening, if the Corporation have omitted so to do, a mandamus will be granted immediately afterwards. Nor is it any objection to the issuing of the writ, that at the time of applying for it an information in the nature of quo warranto is pending against the mayor and corporators to whom it must be directed, for if they have a good title, the election will be valid; and if their title be defective, the Corporation will only remain in its former state; besides, the information may be collusive, and it shall not be allowed them to say in their defence to the information that they have a good title, and to impugn it themselves in opposing the writ.

To elect one
of two no-
minees.

48. It will be granted to compel them to proceed to the election of one out of two persons put in nomination for an office, when the course of proceeding is for one class of the Corporation to nominate two persons, of whom another class is to elect one into the office.

Ministerial
officers.

49. It will be granted to compel the election of annual ministerial officers, if the offices be necessary to the constitution of the Corporation; even such officers as mace bearers, if public ministers and necessary in the execution of the judicial functions of the Corporation; but not if mere private officers or rather servants.

(48) R. v. Abingdon, 1 Ld. Ray. 561. R. v. Ely, 2 T. R. 334.

(49) R. v. St. Martin, 1 T. R. 149. R. v. Liverpool, 1 Barnard. 83.

50. But the Court will not grant a mandamus to fill up vacancies in an indefinite class, however reduced in number, if the members of the definite class are to be elected from it, and sufficient remain to supply the present vacancies in the definite body, and to perform all duties imposed on them by the charter; for it would be lessening their chance of being elected into the definite class. If there are vacancies in the definite body, the application ought first to be to compel the Corporation to fill them up, and afterwards the Court would perhaps grant a mandamus to elect a sufficient number into the indefinite class, to prevent the dissolution of the Corporation, although it may be very difficult to point out how many are to be elected, which is a strong argument against granting the writ.

Indefinite
class.

51. Many difficulties had arisen in Corporations where the chief officer had no power of holding over, for after the expiration of his year, the office of president having determined; if no successor had been elected on the charter day, neither could the Corporation afterwards proceed to a new election of their own accord, nor could the Court of King's Bench empower them so to do. It has been already shown when the Corporation may proceed to an election of their own authority, under the statute of George, which if they neglect to do, the Court of King's Bench is empowered by the following clause of the same statute to authorize and compel them to supply the vacant office.

Mayor,
where no
power to
hold over.

52. "If it shall happen that in any city, borough or town corporate in England, Wales and Berwick-upon-

(50) *R. v. Fowey*, 2 B. C. 590. 593. S. C. 4 D. R. 139.

(52) 11 Geo. I. c. 4. s. 2. Vid. Part I. tit. 531.

Tweed, no election shall be made of the mayor, bailiff or bailiffs, or other chief officer or officers of such city, borough or town corporate upon the day or within the time appointed by charter or usage for that purpose, and that no election of such officer or officers shall be made pursuant to the directions herein before prescribed or such election being made, shall afterwards become void as aforesaid, in every such case it shall and may be lawful for his Majesty's Court of King's Bench, upon motion to be made in the said Court, to award a writ or writs of mandamus requiring the members or persons of such city, borough or town corporate, having a right to vote at or to do any other act necessary to be done in order to such election respectively, to assemble themselves upon a day, and at a time to be prefixed in such writ or writs, and to proceed to the election of a mayor, bailiff or bailiffs, or other chief officer or officers as the case shall require, and to do every act necessary to be done in order to such election, or to signify to the said Court good cause to the contrary, and thereupon to cause such proceedings to be had and made as in any other cases of writs of mandamus granted by the said Court for election of officers of Corporations, and of the day and time appointed in and by any such writ or writs of mandamus for holding such assembly, public notice in writing shall by such person as the said Court shall appoint, be affixed in the market place or some other public place within such city, borough or town corporate, by the space of six days before the day so appointed."

After several years.

53. Under this statute a mandamus will be granted to proceed to an election, although several years have

(53) *R. v. Oxford*, C. T. H. 178. B. N. P. 201. *R. v. Scarborough*, 2 Str. 1180.

elapsed since the expiration of the office of the last legal mayor, or other officers of a Corporation, although there have been officers de facto intermediately elected who have been ousted on proceedings in quo warranto.

54. It will be granted on the application of the Corporation to proceed to a new election where a person has been already elected, who is unqualified to assume the office on account of not having received the sacrament within the preceding year; but in as much as since the remedial statute of 5 Geo. 1. and the annual indemnity act, his election is not absolutely void, the Court will first require that the person so elected shall previously decline acceptance of the office, or show such disqualification as a reason for non compliance, on an application for a mandamus to compel him to undertake it.

Though one is elected, but unqualified.

55. And it will be granted in cases where it is doubtful whether the mayor has a right to hold over, for it is a remedial statute, to be extended for public convenience and the support of Corporations; besides the Court has at common law a power to grant a mandamus to elect where the mayor so holds over.

Where doubt on power to hold over.

56. It will be granted for the election of bailiffs, chamberlains, coroners, and other annual officers, although not chief officers of the Corporation, and also for the election of aldermen, though officers for life.

Other officers.

57. If the office be already full by the possession of an officer de facto, no writ will be granted to proceed to

Not when office full de facto.

(54) *R. v. Bedford*, 1 East, 80.

(55) *R. v. Cambridge*, 4 Bur. 2011.

(56) *R. v. Scarborough*, 2 Str. 1180. *R. v. Thetford*, 8 East, 270. *R. v. Woodrow*, 2 T. R. 732.

(57) *R. v. Newsham*, Say. 212. *R. v. Banks*, 3 Bur. 1454. *R. v. Cambridge*, 4 Bur. 2011. *R. v. Bedford*, 1 East, 80. *R. v. Truro*, 3 B. A. 592.

a new election, until the person in possession has been ousted on proceedings in quo warranto. Therefore it will not be granted during the possession by an officer, against whose title the only objection is, that he has not duly received the sacrament before the election, or qualified subsequently; or whose only defect of title is, that he is a non resident alderman, although the charter declares that where an alderman *shall die, dwell out of the borough, or be amoved*, the others may elect another into the place of him who shall *die or be amoved*. For in the former instance, an ouster in quo warranto is first necessary to show that the place is in fact vacant, and in the latter an amotion, though indeed it is doubtful whether the charter warrants an amotion for non residence, unless it cause some injury to the Corporation.

But where
by a mere
colorable
title.

58. But the writ will be granted where there is only the mere pretence or color of an election, as where the Corporation have elected into the office of mayor a person who had recently sailed to America, so that it was highly improbable that he would return in time to take upon himself the due discharge of the duties of the office; for such a choice is a mere pretext to keep the office under the management of a particular party. So will it be granted where the preceding officers of the same description have been successively ousted in quo warranto, and there is no reasonable expectation that those in possession can maintain their titles; or where the election was made in a riotous manner, and it is evident that the proper officer did not preside. In such

(58) R. v. Newsham, Say. 213. R. v. Tintagel, 2 Str. 1003. R. v. Aberystwith, 2 Str. 1157. R. v. Scarborough, 2 Str. 1180. R. v. Bankes, 3 Bur. 1454. R. v. Cambridge, 4 Bur. 2010. R. v. St. Martin's, 1 T. R. 149.

cases the Court will grant the writ, to avoid putting the parties to the expence of proceeding in quo warranto.

59. When the application is for a mandamus to elect an officer into a place shown to be vacant by the ouster of the officer de facto, on proceedings upon an information in the nature of quo warranto, the motion for the writ may not be made pending the four day rule for judgment on the postea, but the applicant must wait until the judgment is actually signed; and then the writ will be granted to the prosecutor in preference to any other applicant if he move in reasonable time, but if he decline to move for it, or be guilty of an unreasonable delay, it will be granted to any other proper person, even the defendant who has been ousted, or who has entered a disclaimer on the information.

After ouster.

60. The mandamus is not granted to elect a particular individual, but to proceed to an election for the purpose of filling up particular vacancies, or at the utmost where another body has already nominated, to elect one of the nominees.

Is not to elect a particular person.

61. Except when the writ issues under the statute, the Court will not appoint a particular time for holding the elective assembly, although there be a suggestion that a surprize is intended, and that it may be inconvenient for some to attend who have a right to vote; but it will leave the prosecutor to give the usual notice

Or at a particular time.

(59) *R. v. Wigan*, 2 Bur. 784. *R. v. West Looe*, 3 Bur. 1386. *R. v. M'Kay*, and *R. v. Mears*, 4 B. C. 659.

(60) *Shuttleworth v. Lincoln*, 2 Bulstr. 122. *R. v. Abingdon, Ld. Ray*, 559.

(61) *R. v. Haslemere, Say*, 106. *R. v. Evesham*, 7 Mod. 167. S.C. 2 Str. 949. Vid. Part I. tit. 70.

and comply with the regulations of the constitution; for the mandamus is a writ of right, and the Court has no authority to interfere, yet if there be any illegal surprise or other misconduct in the prosecutor or his party, they will not escape punishment for the offence.

62. "In certain boroughs and towns corporate in England, Wales and Berwick-upon-Tweed, the mayor, bailiff or bailiffs or other chief officer or officers is or are to be nominated, elected or sworn at a court leet, or view of frankpledge or some other court, and by reason of the contrivance or default of the lord or his steward, or such other officer by or before whom such court ought to be held, in not holding the same, or by some accident it hath happened and may hereafter happen that no due nomination, election or swearing of such mayor, bailiff or bailiffs, or other chief officer or officers, hath been or shall be had or made: in every such case it shall be lawful for the Court of King's Bench, upon motion to be made in the said Court, to award a writ of mandamus, requiring the lord or his steward or other officer by or before whom such court ought to be held, to hold or cause to be holden such court leet or other Court, and to do every other act necessary to be done by him in order to such nomination, election or swearing, at such day and time as shall be for that purpose judged proper by the said Court of King's Bench, and shall be appointed in such writ, or to signify to the said Court good cause to the contrary, and thereupon to cause such proceedings to be had and made as in other cases of writs of mandamus granted by the said court, for holding of any court, and of the day and time appointed in and by any such writ of mandamus for

holding such court, public notice in writing shall by such person as the Court of King's Bench shall appoint, be affixed in the market place, or some other public place within such borough or town corporate by the space of six days before the day so appointed."

63. Under this statute a mandamus will be granted to compel the steward of a court leet to hold a Court, and swear jurors to make the necessary preliminary presentments, and present the person who has been elected to be mayor, or show cause to the contrary.

What the writ may command.

64. And it may command them to present and admit a particular person who, as the affidavits assert, has been elected mayor, although another claims to have been elected; and not merely to hold the Court, and do all things necessary to the election of a mayor.

65. Or it may command him merely to summon a jury to elect and swear some one into the office of mayor or portreeve.

66. But it will not be granted to command the steward to summon the same individuals to form a jury, who had been previously summoned for that purpose.

67. Under this statute the Court sometimes orders the names of certain indifferent persons to be inserted in

Persons to give notice.

(63) *R. v. Willis*, 7 Mod. 262. S. C. Bul. N. P. 199.

(64) *R. v. Willis*, Andr. 280.

(65) *R. v. Williams*, Say. 141.

(66) *R. v. Bankes*, 3 Bur. 1454. S. C. 1 W. B. 445.

(67) *R. v. Newsham*, Say. 212. *R. v. Haslemere*, Say. 106.

the rule, such as the under sheriff, to give the six days' notice of the time for the elective assembly to convene.

68. Where it was shown that the Corporation omitted to elect a mayor on the last charter day or day following, according to the statute; the Court granted the rule for a mandamus to elect *absolute* in the first instance, observing that it was usual but not necessary to grant a rule to show cause. So it will be granted absolute in the first instance, though the former has held over, or where there is an actual vacancy by his death.

Concurrent writs.

69. The Court will not grant two writs to different parties to proceed to the same election under the statute, even upon a suggestion, that by the collusion of the first applicant, the writ granted to him will not be effectually executed, for the Court will not allow a presumption that their process will be treated with contempt; yet if the suggestion be made in due season, they will order the elective assembly to convene at a particular time, and that notice of it shall be given by the under sheriff or another public officer. But if after such a writ, the parties have not elected at the appointed time, and the officer have neglected to give the notice, a second writ will be awarded to another applicant.

A second like the former.

70. There are instances in which concurrent writs have been granted, but they ought not to issue without a special reason; yet a second in terms similar to the

(68) R. v. Heydon, Say. 208. R. v. Truro, 2 Chit. Rep. 257.

(69) R. v. Scarborough, Say. 105. R. v. Haslemere, Say. 106.

(70) R. v. Oxford, C.T.H. 178. R. v. Wigan, 2 Bur. 784. S. C. 2 Kenyon, 508.

former will be granted to a different party, when there is a well grounded apprehension that the first will not be effectually executed.

II. TO TAKE OFFICE.

71. If a corporator duly elected, refuse or neglect to take upon himself the execution of his office, the Court will issue a mandamus to compel him to do so. On default.

72. The defendant may either show for cause upon the rule, or plead to the writ any sufficient excuse for not accepting the office, as that he is unable to serve through sickness or poverty, or that he has not received the sacrament, or perhaps that he has previously served the office, and that those alone being magistrates who have served that office, the number of them will be too much reduced by his being again elected before his turn. What cause may be shown.

73. But it is no sufficient excuse for refusing the office of mayor, that he is a county magistrate, and that residing four miles from the municipality, it is inconvenient for him to attend, or that the charter makes provision for a new election where such officer *refuses to stand*, for that implies where he refuses with some reasonable and legal excuse; or perhaps that he is mayor of another town. What insufficient.

(71) R. v. Bedford, 1 East, 80. R. v. Leyland, 3 M. S. 188.

(72) R. v. Merchant Taylors, 2 Lev. 200. R. v. Bedford, 1 East, 80. R. v. Brown and R. v. Leyland, 3 M. S. 186. 188. Vid. Part I. tit. 439.

(73) R. v. Brown and R. v. Leyland, 3 M. S. 186. 188. Codicis, l. 10. tit. 28. s. 1.

III. TO ADMIT.

74. A mandamus lies to admit to the legal possession of any public office in a Corporation, but it confers no title upon the person admitted, its sole operation being to put him in a situation to enforce his former title, if sufficient in law, yet the writ will not be granted unless the applicant show a *prima facie* title, for the sake of preserving the peace of Corporations.

To what
offices.

75. This writ lies to compel the proper officers to admit to the possession of his office or place, one elected to be a mayor, bailiff or other chief officer, an alderman, jurat, capital or other burgess; one of the approved men, or one of the eight men, if the affidavits show that approved-men or eight-men are a class of corporate officers; a high steward, a common-councilman, a recorder, a town clerk, a steward of a court leet an attorney of the court of a liberty; a liveryman of a company being a member of a municipal Corporation; a sword bearer if an officer of justice; a serjeant, a constable, a bailiff, though a ministerial officer, or even a common freeman.

(75) Vid. Part I. tit. 726. 2 Rol. Abr. Rest. p. 4. 8. 7. Steven's Case, T. Ray. 431. Shuttleworth v. Lincoln, 2 Bulstr. 122. R. v. Canterbury, 1 Lev. 119. Taylor's Ca. Poph. 133. Braithwaite's Ca. Vent. 19. Anon. 1 Lev. 148. R. v. Wilton, 5 Mod. 257. Clerk's Case, Cro. Jac. 506. Parker's Ca. 1 Vent. 331. R. v. Tidderley, Sid. 14. Guildford Case, T. Ray. 152. Roe's Ca. Comb. 145. London v. Estwick, Sty. 32. Bret's Ca. Comb. 214. R. v. Wells, 4 Bur. 1999. Anon. Dier, 332. b. n. Taverner's Ca. T. Ray. 446. Middleton's Ca. 1 Sid. 169. Milward v. Thatcher, 2 T. R. 87. Stamp's Ca. T. Ray. 12. Baxter's Ca. Sty. 355. Audley v. Joyce, Poph. 176. S. C. Noy, 78. Dighton, 1 Vent. 78. 82. R. v. Champion, 1 Sid. 14. Baxter's Ca. Sty. 457. Hurst's Ca. 1 Lev. 75. S. C. 1 Sid. 94. 152. Anon. and R. v. Westminster, Comb. 244. Rol. Abr. 456.

76. The writ will be granted to compel the admission of one elected to be ale taster, where that office is a previous qualification to being elected portreeve of the borough, who is the returning officer of members of parliament; or to admit to the office of petty constable when he is such returning officer, although these are not corporate offices. Other offices, when public.

77. The writ will be granted to compel the proper officers to admit to the freedom of a Corporation, any of that class of persons who are possessed of an inchoate right, according to the regulations of the constitution, such as apprentices who have served their time; and if there be a rule that certain courts shall be held for the examination of the claims of such persons by proper officers, before they are allowed to be admitted, a mandamus will be granted to require the Corporation to hold such courts, if they have refused to examine the applicant's claim at former courts held for this purpose. But where there is a custom that those who claim admission to the freedom, must be presented by the jury to the mayor, before he can admit them; a mandamus cannot be awarded to the jury, to present certain persons, for they present or reject according to the truth of the fact on their oaths; and therefore the Court may not direct them in this respect; yet when they have presented the claimants, a mandamus will issue to compel the mayor to admit them. Those having inchoate right to freedom.

78. If those who have an inchoate right to the freedom are required by the regulations or by-laws of the

(76) *Ravenhil's Ca.* 1 Str. 608. *Anon.* 1 Barnard. 279.

(77) *Townsend's Case*, T. Ray. 69. S. C. 1 Lev. 91. S. C. 1 Sid. 107. *Green v. Durham*, 1 Bur. 131. *Clithero Ca.* Comb. 239.

(78) *R. v. Ludlam*, 8 Mod. 270. *Wannel v. London*, 1 Str. 675. *R. v. Harrison*, 3 Bur. 1328. S. C. 1 W. B. 372. *Green v. Durham*, 1 Bur. 131.

municipal Corporation to be admitted into the company of their respective trades, before they can be admitted to the freedom of the municipal Corporation; a mandamus will be awarded to compel the officers of the company of his own trade to admit the applicant, whether he have acquired a right to be admitted into that particular company by birth, apprenticeship or otherwise; or although he had originally no such right to be admitted into that, but a similar right to be admitted into some other company, if he found his claim of admission upon a by-law of the Corporation, that no person of his trade shall be admitted to the municipal freedom, unless he have been first admitted to the freedom of the company of the trade which he pursues. Therefore if there be a by-law that no butcher shall be admitted to the freedom of the city, unless he be free of the butchers' company; one who has served his apprenticeship as a clothworker, and thereby acquired a right to be admitted into the company of clothworkers, if he practise the trade of a butcher forfeits his right of admission into the clothworkers' company, by force of the by-law, but acquires under it a right to be admitted into the company of butchers.

Deputies.

79. A mandamus will be granted on the application of a recorder or other officer, to compel the admission of his deputy, where he has the power of appointing one; but where the charter has not empowered him to appoint a deputy, and the Corporation have subsequently imposed new duties upon him, to be performed either in person or by deputy, the writ will not be granted to admit his deputy to the place of deputy gene-

(79) *R. v. Clapham*, 1 Vent. 111. *R. v. Gravesend*, 2 B. C. 604. S. C. 4 D. R. 117. *Jones v. Williams*, 5 D. R. 660. *R. v. St. Albans*, 12 East, 559. n. *R. v. Ward*, 2 Str. 897.

tally, but it will perhaps be granted to admit him to the discharge of those particular duties, which the Corporation have subsequently imposed. The command must not be to admit and swear in the deputy as a member of the Corporation, unless the constitution have declared him to be a corporate officer, but merely to swear him to the due discharge of his delegated office.

80. The writ will not be granted to admit and swear in an inhabitant at a court leet, under the character of a *resiant*, merely because he is an inhabitant of a prescriptive borough, unless he show in all the *resiants* a clear right to be burgesses of the Corporation, or to vote in the election of members of parliament or some other such interest. And it is said that such right or interest must be prescriptive, where the application is to be admitted a *corporator* on the ground of such right as a *resiant* merely. Resiants.

81. Nor will it be granted to admit a deputy to his place on the application of the *deputy* himself, although it is granted on the application of his principal. On whose application.

82. The applicant to be admitted must show that the office is such for which a mandamus ought to be granted: if it be that of mayor, or an office judicially noticed by the Court as a corporate office, no further description is necessary; but if from the name of the office the Court would not understand it to be a public corporate office, it is requisite that the *affidavits* ex- Nature of office must appear.

(80) *R. v. West Looe*, 3 B. C. 683. 686. S. C. 5 D. R. 597. *R. v. West Looe*, 2 D. R. 182.

(81) *R. v. President des Marches*, 1 Lev. 306.

(82) *Anon.* 2 Mod. 316. *R. v. Guilford*, 1 Lev. 162. S. C. T. Ray. 152.

plain its nature ; therefore if the application be to be admitted to the office of one of the *approved men* (of Guilford) or one of the *eight men* (of Ashborn Court) the affidavits must show the nature of the office, that the Court may consider whether it be of such a public character that the writ ought to be granted.

Essentials
of title.

83. The affidavits in support of an application for admission to an office, must show the mode of election to it, and those for admission to the place of a freeman must show the regulations of the Corporation, by which an inchoate right to the freedom is acquired ; they must also show what preliminary conditions are to be performed before admission, such as the payment of a fine.

That the
applicant
has such
title.

84. They must also show the applicant's title by such election or acquisition of such inchoate right, and that he has complied with such preliminary conditions, as by tendering the fine, and that he has made due application to the proper officer to admit him, and been rejected.

85. When there is a fine payable, it is necessary to show a tender of it, but if it be said that there is a reasonable *fine* payable by custom, and it has been usual to receive a certain sum, it is sufficient without showing the amount, and it is sufficient also to allege a tender of a reasonable fine, without stating the amount ; for a reasonable fine does not imply a fine uncertain, or any discretion in the officer to vary the amount or dis-

(83) *R. v. Newling*, 3 T. R. 310. *Moore v. Hastings*, C. T. H. 353. 362.

(84) *Moore v. Hastings*, C. T. H. 353. 363. *R. v. West Looe*, 3 B. C. 686.

(85) *Moore v. Hastings*, C. T. H. 353. 362.

pute the reasonableness of the usual payment; it is only necessary that the Court should perceive that the officer has been previously called upon to do his duty, and that the applicant is in no default.

86. If it appear that the applicant to be admitted to a corporate office has not complied with the provisions of the statute of Charles, in receiving the sacrament, a mandamus will be refused.

87. Notwithstanding the old doctrine that a mandamus to admit gives no title, it will not be granted to an applicant claiming under a disputed election to a corporate office, such as that of recorder, when it is already filled by an officer de facto, even under a peremptory mandamus obtained by collusion, and although such officer claim under the same election; for there is another remedy open to the applicant, which is to try the title of the officer de facto, by applying for an information in the nature of quo warranto, on which, if judgment of ouster go against the defendant, a mandamus may be granted with less inconveniency to the Corporation. But the mandamus will be granted where quo warranto does not lie, although the office be already full, otherwise in many cases the applicant would be without remedy.

When refused to corporators.

88. One had been previously admitted to the office of mayor, under a peremptory mandamus; the Court therefore refused a writ to another applicant claiming

(86) *Crawford v. Powell*, 2 Bur. 1016. *R. v. Monday*, Cowp. 539, 540. *R. v. Hawkins*, 10 East, 216. *R. v. Parry and Phillips*, 14 East, 561.

(87) *R. v. Barker*, 3 Bur. 1265. *R. v. Colchester*, 2 T. R. 260. *R. v. Thatcher*, 1 D. R. 427.

(88) *R. v. Turner*, T. Jones, 215.

to have been the person duly elected; at least the Court said that they ought to adjudge the person admitted under the peremptory writ, to be mayor till the matter had been tried by an action, and on this suggestion it was consented by the parties to try the right at bar by a feigned issue.

89. The mandamus will not be granted if there appear to be a usage that the same person shall not be elected to such office for more than two years in succession, and that the applicant having filled the office for the three preceding years, is now elected the fourth time; and although there be some evidence in explanation of the usage if there be none in contradiction, the Court will summarily determine upon it without sending the question to a jury.

Concurrent
writs.

90. There were concurrent writs of mandamus to admit two different sets of churchwardens claiming in opposition to each other; the return was that there were proceedings pending between them in the ecclesiastical Court, before him who made the return, to determine the right; the Court held the return insufficient, and declared that unless there were some better cause, both sets must be admitted. But perceiving the inconvenience likely to arise from such admissions, they directed an issue to try their titles. It was observed that the return would have been bad, had the defendant power to try the legality of the votes, which in this case he had not, for his office in admitting is merely ministerial.

(89) R. v. London, 1 T. R. 426.

(90) R. v. Harris, 3 Bur. 1422.

91. On an application to admit and swear in, if the right is made plainly to appear by the applicant's affidavits, the rule will be granted absolute in the first instance, otherwise it will only be granted nisi.

Rule absolute.

IV. TO AMOVE.

92. If a statute require that all persons in possession of corporate offices, shall take a particular oath, under penalty of being displaced, the Court will grant a mandamus to the Corporation to amove certain persons (naming them) from their offices, on account of their having omitted to comply with the statute.

For disobeying a statute.

93. But the writ will not be granted to compel the Corporation to amove certain persons from their offices on account of non-residence.—It having been said in several cases when applications were made for informations in the nature of quo warranto, against persons assumed to have forfeited their offices by non-residence, that there must be a previous amotion before quo warranto could be prosecuted, it was thence inferred that although a mandamus to amove could not be granted, the Court might award a writ to the Corporation to assemble and take into consideration the propriety of amoving for that cause. This opinion has been corroborated by a dictum of Ashhurst (J.) and the qualified manner in which such applications have been refused;

To consider on an amoval.

(91) B. N. P. 199. R. v. Jotham, 3 T. R. 577.

(92) Stat. 1 W. & M. c. 8. R. v. St. John's Col. Skin. 549.

(93) R. v. Ponsonby, 1 Kenyon, 27. S. C. Say. 248. S. C. 5 Bro. P. C. 299. Lord Bruce's Ca. 2 Str. 819. R. v. Heaven, 2 T. R. 776. R. v. Portsmouth, 3 B. C. 156. S. C. 4 D. R. 773. R. v. West Looe, 5 D. R. 416. R. v. Totness, 5 D. R. 483.

for the Court, avoiding to give a direct opinion, have rejected the applications on other grounds, such as that the applicant ought to be a resident corporator, or a person injured by the neglect of the Corporation, or that the affidavits ought to show that residence is rendered necessary by the terms of the charter, or that a public inconvenience has arisen from the default of the non-residents; and that it was not sufficient that the charter declared it lawful for the Corporation to amove for non-residence, or that by the non-residence of some, a greater burthen was thrown upon the rest of the members, or that there were only five capital burgesses resident out of twelve, the number appointed by the constitution, or that out of fourteen councillors ten only resided, of whom four were on account of their infirmities unable to attend to business, by reason of which, corporate assemblies were unfrequent, whence much inconvenience arose to the inhabitants, and though the charter expressly required the residence of the councillors. Hence it may be concluded that a mandamus of this kind will on no occasion be granted, and the language of Lord Chief Justice Abbot is very strong to this effect; for he observed, that if the Corporation convened in obedience to the writ, but refused to amove, he was not satisfied that they would be liable to punishment by criminal information.

94. This point not being concluded by any decision, the following rule may be proposed upon principle.—Where the charter declares it lawful for the Corporation to remove for non-residence, the Court has no jurisdiction by mandamus to compel them to amove; and a mandamus to convene and consider the propriety of amoving will in all instances be nugatory, for if they are inclined to amove, the mandamus is unnecessary;

if they are disinclined, the charter having allowed them the exercise of their discretion, the Court of King's Bench cannot take it away, which would be the effect of punishing them for not amoving. Where the charter declares that the office shall not continue longer than the officers constantly reside, the Court might grant a mandamus to amove the non-residents, upon which the Corporation might either effect the removal or return for cause of not amoving, that the persons were still resident, and set forth the nature of their residence; upon which the Court would either allow the return as sufficient in showing that the parties accused were not non-resident, or, disallowing the return, issue a peremptory mandamus, and attach the corporators if they should neglect to obey.

95. The only methods of punishing non-residents, when residence is necessary, and the Corporation will not remove them, which has been recognized by the Court, is by filing a special information of a criminal nature against the individuals for their neglect of duty, or when the whole or a major part of the Corporation connive at and participate in the offence, by instituting proceedings on scire facias, by authority of the attorney general, to repeal the charter as forfeited by the abuse. On the latter method of proceeding, some observations have been already submitted.

V. TO RESTORE.

96. When a corporator has been unjustly or irregularly amoved or suspended from his office or dis- To what offices.

(95) *R. v. Ponsonby*, 1 Kenyon, 30. S. C. Say. 248.

(96) *Vid.* Part II. tit. 75.

franchised, the Court will grant a mandamus to compel his restoration. The writ will be granted to effect a restoration to any of those offices or places for which it will be granted to command admission.

Public
financial
office.

97. A mandamus will also be granted to restore to a public office of a financial character, if granted for life or *quamdiu bene se gesserit*; such as the office of comptroller of the bridge estates, in London, particularly where the officer is obliged on admission to take an oath of office, and of duty to the government; or to such an office as that of clerk of the works of London, an office for life with fees and profits, for which the possessor pays a premium on admission and takes such oaths. It has even been granted for the office of clerk to the company of masons in London, or treasurer to the governors of the new water-works.

Officer at
will.

98. It was held that an officer at the will of the Corporation, should have a writ of restoration when he was turned out by others, and not by the Corporation; but I know not how he could be turned out by others, for their attempt could not amount to an amotion, but a mere preclusion and disturbance in the exercise of his office.

Deputy.

99. Conformably with the rule as to admission, it will be granted on the application of an officer to restore

(97) *R. v. London*, 2 T. R. 182. et n. *R. v. London*, 2 Barnard. 398. Lord Hawley's Ca. 1 Vent. 145. *Bernardiston's Ca.* Sty. 452. *Stamp's Ca.* Comb. 348. *R. v. Axbridge*, Cowp. 523. *R. v. Governors of Water Works*, 1 Lev. 123. S. C. 2 Sid. 112. *Middleton's Ca.* 1 Sid. 169.

(98) *Anon.* 1 Barnard. 195.

(99) *R. v. President of the Marches*, 1 Lev. 306. Vid. II. 79.

his deputy, but not on the application of the deputy himself.

100. It will not be granted to a public officer who admits that he was justly but irregularly amoved. When evident misconduct.

101. One who has been suspended from the enjoyment of his office, may obtain this writ, as well as one who has been removed ; for a suspension is a temporary amotion, and otherwise, under pretence of repeated suspensions, an officer might be entirely excluded from the advantage of his situation. On suspension.

102. It is no objection to granting the writ that another has been elected into the office since the amotion of the applicant ; and when this is the fact, the Court will grant leave to file an information in the nature of quo warranto against the person so elected, at the same time they award the mandamus. After election into his place.

103. Nor is it any objection to granting a writ to restore a mayor who has power to hold over, that his year has expired during the interval between the amotion and his application for the writ, unless a successor has been duly elected. But it will not be granted after the expiration of his year, to a mayor who has no such power. Mayor, after expiration of his year.

(100) *R. v. Axbridge*, Cowp. 523.

(101) *R. v. Guilford*, 1 Lev. 162. *S. C. T. Ray*. 152. *R. v. London*, 2 T. R. 182. *R. v. Whitstable*, 7 East, 355. et n.

(102) *R. v. Bedford Level*, 6 East, 360. *Shuttleworth v. Lincoln*, 2 Bulstr. 122.

(103) *Mayor of Durham's Ca.* 1 Sid. 33. *Mayor of Penryn's Ca.* 1 Str. 582. *S. C. R. v. Hearle*, 1 Str. 627.

After quo
warranto.

104. It will not be granted to restore one who has been ousted in quo warranto, or who has resigned his office; for judgment in quo warranto is conclusive against the defendant, whether on the writ or on the information, and after a resignation accepted, the corporator cannot resume his office.

After amotion, restoration, and death of another.

105. A. was amoved, and B. was elected in his place, afterwards A. was restored by mandamus, his amotion being insufficient, by which means the title of B. was vacated; the office of A. subsequently became vacant, and B. without having been a second time elected, applied to be restored to the office; the writ was refused, for A. was a legal officer at the time of B.'s election, so that he never acquired any title to the office.

Private officer.

106. It will not be granted to a mere private officer, such as the steward of a court baron, or the clerk of the butchers' company of London.

107. It will not be granted to a financial officer for life, or quamdiu bene se gesserit, who has been suspended until he has submitted his accounts to the proper officers, and paid over the balance where it is his duty to do so, and it appears from his own showing that he has refused, and been guilty of contumacy and improper conduct towards the common council whose officer he is.

(104) *R. v. Tidderly*, 1 Sid. 14. *R. v. Campion*, Ib. Vid. *Quo War. Judgment*.

(105) *Shuttleworth v. Lincoln*, 2 Buls. 122.

(106) *R. v. White*, 3 Salk. 232. Sed vid. II. 97.

(107) *R. v. London*, 2 T. R. 182. Vid. Part II. tit. 101.

108. In applying for a mandamus to be restored, it is not necessary to assert that the prosecutor was once in the office, for if this were not the case, the other party may show it. Form of application.

109. Although the right to be restored is shown to the satisfaction of the Court, they will only grant the rule nisi in the first instance, for they will not presume an attempt to amove or disfranchise without some reason or pretence of justice, which the opposite party may show for cause why the writ should not issue. Rule nisi.

VI. MISCELLANEOUS.

110. When the regulations of the Corporation render it necessary, for the acquisition of the freedom, that the indentures of apprenticeship shall be enrolled, a mandamus will be granted to compel the proper officer to enroll them. The affidavits must show the necessity of such enrolment, and that application has been made in vain to the person whose duty it is to perform it. To enrol indentures.

111. It has been already shown that a mandamus will be granted to compel the custos of corporate documents to allow an inspection, and copies of them to any corporator at proper times, and upon proper occasions. The application must show clearly a right to such inspection and copies, and a refusal on the part of To inspect corporate documents.

(108) R. v. Cutlers, C. T. H. 129.

(109) Bul. N. P. 199. R. v. Jotham, 3 T. R. 577.

(110) R. v. Coopers of Newcastle, 7 T. R. 545.

(111) R. v. Shelley, 3 T. R. 142. R. v. Lucas, 10 East, 235. R. v. Tower, 4 M. S. 162.

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To proceed in administration of justice.

115. If a first writ, when fully executed, does not effectuate the purposes for which it was granted, the Court will, it seems, award a second to complete the act begun, and administer ample justice.

Auxiliary writ.

116. But this writ will not be granted to compel a Corporation to make leases of their property, which has fallen into hand, for this is their own private concern.

Not to make private deeds.

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issue. This must be directed to and served upon the persons to whom the applicant proposes to direct the writ. All persons principally interested in the defence must be included in the rule to show cause; therefore where the application is for a writ to proceed to the election of a mayor under the statute of George, if one occupies the office on pretence of being at least mayor de facto, though having only a color of title, his name must be inserted in the rule: yet where this had been omitted, the Court enlarged the rule and allowed time to amend. So the names of the persons proposed to be removed for not taking oaths in obedience to a statute, must be inserted in the rule nisi.

Enlarge-
ment.

118. If there remain five days of the same term, in which the defendant has an opportunity of showing cause, the Court will not enlarge the rule until the following term, on the ground that it is necessary to investigate many documents.

Discharged
on account
of obedi-
ence.

119. If the defendant upon the rule nisi, do all those things for the performance of which the writ is desired, the Court will discharge the rule and not put him to the expence of making a return. But after the rule is made absolute, although he do all that is required of him before the issuing of the writ, if the writ in fact afterwards issue, the Court will not supersede it, but leave him to make a return showing his obedience.

Cause
shown.

120. The defendant may show for cause any of those circumstances which have been before pointed out as reasons for not granting the writ, or any other which

(118) *Canterbury, (Archb. of) v. Trinity College*, 1 Barnard. 194.

(119) *R. v. Liverpool*, 1 Barnard. 83. *Anon.* 1 Barnard. 362.

show that the applicant never had a right to the writ, or that he has by his own neglect or misconduct precluded himself from expecting the assistance of the Court.

121. If the affidavits for the defendant, so positively and expressly deny all the material facts upon which the applicant founds his title, that if the denial be false, the deponents may be convicted of perjury, it is the practice of the Court to discharge the rule and leave the applicant to prosecute them for perjury. This doctrine was laid down on a rule for an attachment; but it is apprehended that it may be applied to the present case.

Negation of prosecutor's statements.

122. If the affidavits upon which cause is shown, be sworn before a commissioner, the name of the place where sworn must be inserted in the jurat, to point out a venue for laying the perjury, if they are false, and to assist the Court in ascertaining from their records the fact of the person being a commissioner, otherwise they cannot be read.

Place of swearing affidavits.

II. RULE ABSOLUTE.

123. If, after the answer of the defendant has been heard upon the rule to show cause, there still remain in the applicant a reasonable appearance of title, upon a doubt either in matter of fact or of law, the rule will be made absolute; but the Court will not readily grant applications of a novel kind, which may probably tend to the disturbance of Corporations in general.

On fair doubt of prosecutor's right.

(121) R. v. Harrison, Say. 111.

(122) R. v. West Riding, 3 M. S. 494.

(123) R. v. Rye, 2 Kenyon, 468. R. v. West Looe, 5 D. R. 599.

An issue to try a custom.

124. If the question should turn upon a custom, which the parties are desirous to have tried, the Court will direct an issue for that purpose.

Form of rule.

125. It is not necessary that the rule specify the whole mandamus, but it must give the general outline which may be filled up in the more particular phraseology of the writ.

Affidavits taken out of Court.

126. The rule for a mandamus had been made absolute, and the attorney for the defendant removed from the Court several affidavits which he had used in showing cause: these he refused to deliver to the proper officer until he should have consulted his counsel. On motion supported by an affidavit of these facts, the Court made a peremptory rule on the attorney to produce them on the next day at the crown office, that they might be filed, for the purpose of using them in drawing up the rule.

127. The rule is drawn up by the clerk of the crown-office, and taken to the applicant's clerk in Court, who upon production of it, makes out the writ of mandamus.

III. FORM OF THE WRIT.

Precision in language.

128. The writ of mandamus is now become a formal writ, that is it requires all the essential formalities of

d.

(124) *R. v. London*, 1 T. R. 333.

(125) *R. v. Willis*, 7 Mod. 262. Vid. Part II. tit. 129.

(126) *R. v. Middlesex*, 1 Chit. Rep. 368.

(127) *Impey*, Mand. 115, 116.

(128) *R. v. Dublin*, 1 Str. 540. *R. v. Nottingham*, Say. 36. Sel. N. P. 1061.

other writs, but no precise or technical formality is necessary in the language in which it is composed. It is in style an injunction in the king's name to the party, commanding him to do his duty as pointed out in the sequel.

129. The writ must in all material circumstances follow the rule upon which it is founded, but it may enlarge in directing those things which are, as it were, incidents to a mandamus, and in drawing it up the practice of the Court is to be observed instead of adhering to the strict letter of the rule. Must follow rule in substance.

130. If it vary materially from the rule, it will be quashed, although the Court would have granted as ample a rule as such a writ requires, had it been originally desired on the application. As if the rule was for a mandamus to the mayor &c. to hold certain Courts, and do the offices of the Corporation, and the writ directed them to hold such courts, do such offices, *and admit* to the freedom of the Corporation *all those* who had a right, and should appear before them to demand it. Or if the rule be to hold certain courts, and the writ direct to hold such courts and re-admit *all* who are entitled to readmission. Or if it be to deliver the corporate documents to the new *clerk*, and the mandamus direct that the documents be delivered to the Corporation.

(129) *R. v. Willis*, 7 Mod. 262. *Hyde v. Thrustout*, Say. 203. *R. v. Wildman*, 2 Str. 879. *R. v. Water Eaton*, 2 Smith. 55.

(130) *R. v. Kingston*, 8 Mod. 210. S. C. 11 Mod. 382. S. C. 1 Str. 578. *R. v. Wildman*, 2 Str. 880. *R. v. Water Eaton*, 2 Smith. 55.

Direction.

131. The Court will not order how the writ shall be directed, but will leave the party who applies for it to direct it at his peril. If it be misdirected, by direction to the wrong persons, it may be superseded on motion or argument; but if directed by an erroneous name, this must be relied upon in the return, upon which the writ will be superseded in the same manner as an action falls upon a good plea in abatement.

In corporate name.

132. If the act commanded, must be done by the whole Corporation, the writ ought to be directed to them in their corporate name, and neither by an enumeration of the classes of which the Corporation consists, nor to all the members as individuals. If the Corporation therefore be called mayor and commonalty, and consist of mayor, aldermen and burgesses, it must be directed to the mayor and commonalty of—and not to the mayor, aldermen and burgesses; at least if there happen to be any other corporate officers as recorder or town clerk.

133. And it must be directed in the corporate name, although the mayor who is an integral part of the Corporation, and included in the corporate name, happen to be dead, and the writ is to compel an election into his vacant place; or although it be to elect a mayor under the statute, where, the former mayor having no power to hold over, the office is at the time vacant. Where it was doubtful whether the last mayor had

(131) *R. v. Smith*, 2 M. S. 598. *R. v. Norwich*, 1 Str. 55. *R. v. Hereford*, 2 Salk. 701. *R. v. Abingdon*, 1 Ld. Ray. 560. *R. v. Ipswich*, 2 Ld. Ray. 1239. S. C. 2 Salk. 435. Vid. Part I. tit. 45.

(132) *R. v. Smith*, 2 M. S. 598. *R. v. Abingdon*, 1 Ld. Ray. 560.

(133) *R. v. Smith*, 2 M. S. 598. *R. v. Borough of Plymouth*, 1 Barnard. 81. *R. v. Cambridge*, 4 Bur. 2011.

power to hold over, the Court ordered that the writ should be directed to the "late mayor" without specifying his name.

134. If the power of electing an officer be in the mayor and burgesses, and the right of admitting and swearing him into office in the mayor alone, it is not only sufficient but most proper to direct the writ generally by their corporate name, commanding them to "elect and swear in a mayor according to their authority;" for this shall be taken distributively, that is, for those who have a right to vote in the election, to elect, and for such as have the right to admit and swear in, to perform that part of the command.

135. And the writ may be directed in the corporate name, although the act commanded is to be done by a select body, without the interference of the rest; for their act in such capacity is the act of the Corporation.

136. If the body having the power of motion and who moved the applicant, were the mayor and thirty of the common council, the writ of restoration should be directed in the corporate name, for their act is the act of the Corporation.

137. Yet where the act is to be done by a select body alone, the writ may be directed to them alone in

To select
body.

(134) *R. v. Tregony*, 8 Mod. 112. 128.

(135) *R. v. Gloucester*, Holt. Rep. 451. *Pees v. Leeds*, 1 Str. 640. n. *R. v. Smith*, 2 M. S. 298.

(136) *Taylor v. Gloucester*, 1 Rol. 409.

(137) *R. v. Smith*, 2 M. S. 598. *R. v. Abingdon*, 1 Ld. Ray. 560. S. C. 2 Salk. 700. *R. v. Newsham*, Say. 212.

their name as a select body. As if the right to elect a mayor be confined to the aldermen or to the common council, the writ to elect even under the statute of George may be directed to the aldermen or common council generally.

138. So the writ to restore may be directed to that select body alone, who have the power of electing and amoving such person, for the power of restoring him is vested in it by implication.

139. If the writ directed to a select body, and not in the corporate name, include in its direction any others besides those whose duty it is to obey the command, it will be superseded for misdirection. As if the right to elect a town clerk be in the mayor and aldermen alone, and the writ be directed to the mayor, aldermen and common council. Or if the right to admit a town clerk be in the mayor alone, and the writ be directed to the mayor and aldermen. But if the power of amotion be in the mayor alderman *and others of the common council*, a direction to the mayor, aldermen *and common council* is sufficient; for though the mayor and aldermen being part of the common council, the direction by the omission of the words *others of* is a repetition of the mayor and aldermen: none are included in such direction except those who have a right to act.

In what capacity.

140. The writ must not only be directed to the Corporation or select body in their proper name, but also

(138) Holt's Ca. Freem. 442. et n. S. C. T. Jones, 52. R. v. Abingdon, 1 Ld. Ray. 560. R. v. Gloucester, Holt. Rep. 451.

(139) R. v. Smith, 2 M. S. 598. R. v. Abingdon, 2 Salk. 700. R. v. Hereford, 2 Salk. 701. Pees v. Leeds, 1 Str. 640. R. v. Norwich, 1 Str. 55. R. v. Wigan, 2 Bur. 782.

(140) R. v. West Looe, 3 B. C. 685. S. C. 5 D. R. 599. Papilion and Dubois Ca. Skin. 64.

in their proper capacity, and the application must state plainly in what capacity it is intended that the writ should be directed to them. Therefore where the same individuals are the officers of the Corporation, and of another Court, it must appear in which capacity it is intended to issue the writ to them. For this reason an application for a mandamus to admit an inhabitant "as a resident" must be for a writ to them as officers of the court leet, and not as corporators; so a mandamus to swear in the sheriffs of London must be directed to the "mayor and aldermen," being their corporate capacity, and not to "the Court of mayor and aldermen," which, though consisting of the same persons, and though the admission is in fact made when they are assembled in that court, is a capacity dehors their corporate.

141. It is in the discretion of the Court to include several persons in the same writ as prosecutors, and they will include several when they constitute but one officer, as where two bailiffs occupy but one chief office, and their claim is precisely the same; at least, if such a writ have issued to admit them, they will not supersede it on that ground alone. Several rights.

142. But several distinct rights cannot be included in the same writ; as to restore five persons to their offices, though of the same description and in the same Corporation, for the turning out of one is not the amotion of the others; and though some may have a right to be restored, the cause and form of amoving the rest may be sufficient. And so where several apply to be

(141) *R. v. Montacute*, 1 W. B. 60. *R. v. Kingston*, 1 Str. 578. n. *R. v. Ipswich*, 1 Barnard. 407.

(142) *R. v. Kingston*, 1 Str. 578. *Andover Case*, 2 Salk. 433. *Anon.* 2 Salk. 436. *R. v. Chester*, 5 Mod. 11. *R. v. Liverpool*, 1 Barnard. 83. *R. v. Water Eaton*, 2 Smith. 55.

admitted, some may have title and others not. Nor will the writ be granted in general terms, as to admit all who have a right to admission and who make their claim, or to assemble and do their duty, or perform those things which are necessary for the Corporation. And upon either of these grounds the writ will be superseded, even after an insufficient return.

Right of
prosecutor
must be
shown.

143. The writ must show the right of the applicant to have the act commanded done in his favour, and a default in the defendant to do his duty; but if there be a defect in setting out the title, it will be cured by a return admitting it, and relying upon some other objection.

144. A mandamus to admit one who has served his apprenticeship, may show that the right to be a freeman is acquired by serving an apprenticeship with a resident freeman, and aver that the prosecutor had served his apprenticeship "with A. B. the said A. B. being a freeman of the said town, and having lived during the apprenticeship in that town &c." for this is a sufficient averment that B. was and continued a resident freeman during the apprenticeship.

145. If there be a fee payable on admission to the freedom or office, it is necessary in the application to show that it has been tendered, but it is not necessary that the writ contain an averment of the tender.

(143) *R. v. Whiskin*, Andr. 3. *R. v. Coopers of Newcastle*, 7 T. R. 548. *Peat's Ca.* 6 Mod. 310.

(144) *R. v. Whiskin*, Andr. 3.

(145) *Moore v. Hastings*, C. T. H. 363.

146. A mandamus to a company to enroll the indentures of an apprentice, may state generally that every person who has served an apprenticeship of seven years under indentures of apprenticeship to a free burgess &c. whose indentures of apprenticeship have been enrolled &c. is entitled to be admitted to the freedom of the municipality, and then aver that the applicant on the first of May &c. was by indentures bound apprentice to A. B. (then being a free burgess &c.) for seven years, that the said indentures ought upon being tendered to the &c. to have been enrolled, and that the said indentures were tendered by the applicant to the defendant in order that they might be enrolled, but that the defendant refused to enroll them.

147. If the prosecutor, having been formerly outlawed, obtain a mandamus to be restored, the writ must set forth the outlawry and its subsequent reversal, otherwise, although it have been in fact reversed, the Court will not judicially notice the reversal on a return of outlawry.

148. Where no particular person is interested, the general right must be shown. An averment, that time whereof the memory of man is not to the contrary, there has been and ought to be in the town of N. a common council consisting of twenty-four persons, is a sufficiently formal allegation of the prescriptive constitution: it is not too general; nor does the averment that there *ought to be* include matter of law, but merely

Public
right.

(146) R. v. Coopers of Newcastle, 7 T. R. 548.

(147) R. v. Bristol, 1 Show. 288.

(148) R. v. Nottingham, Say. 36. S. C. Bul. N. P. 201. R. v. Devizes, Ib. 204.

brings the fact of usage before the jury. This sufficiently shows the general right that there should be an election to fill up vacancies as they occur, and should be followed by an averment that there are such vacancies.

Duty of defendant.

149. In a mandamus to undertake an office, it is sufficient to show the general liability of the defendant to serve, and allege that he was elected, and without reasonable cause refused to undertake it: it is unnecessary to aver that he was able and fit to serve.

150. The writ must show with convenient certainty the duty to be performed, but need not show by what authority the duty exists, or that the defendant is the person bound to perform the act; for if that be not the case he may rely upon it in his return.

151. The command must be to perform some definite and specific act or acts, so that a certain and conclusive return may be made that the act is done.

152. The command must be to perform the act; as to admit, restore &c. and not to command others to perform it. Therefore a writ directed to the Corporation, reciting that A. and B. had removed the prosecutor, and commanding them to require A. and B. to restore him, will be superseded.

(149) *R. v. Merchant Taylors*, 2 Lev. 200.

(150) *Bul. N.P.* 204. *R. v. Bettesworth*, 2 Str. 857. *R. v. Ward*, 2 Str. 897.

(151) *Andover Case*, 2 Salk. 433. *Anon.* 2 Salk. 436. *R. v. Kingston*, 1 Str. 578. *R. v. Water Eaton*, 2 Smith. 55. *R. v. Liverpool*, 1 Barnard. 83.

(152) *R. v. Derby*, 2 Salk. 436.

153. A mandamus is granted to proceed to the election of some one to fill a certain office, but not to elect a particular individual to supply the vacancy. And it does not appoint the election to be at a time certain, except when it issues under the statute.

154. It is granted to restore the prosecutor to the office of mayor, but not to restore him to that office to enjoy it for so long a time after the expiration of his year, as was wanting to complete his time of office at the period of the amotion.

155. The command to admit to the corporate freedom should be to admit to the *privilege*, and not to the *office and place* of a freeman.

156. It seems to be sufficient to command the delivery of corporate documents in a term so general as "*evidentias*."

157. There is a quære whether the command to deliver books in the possession of an ex-officer, should be to deliver them to the Corporation, or to the officer who is to have the future possession of them. It seems that it should be to deliver them to the Corporation, yet they must be received by the officer entitled to the custody. And in the case of Nottingham the writ commanded the delivery to be made to the new officer.

(153) *R. v. Bridgewater*, 2 Chit. Rep. 257. *Shuttleworth v. Lincoln*, 2 Bulstr. 122. 2 Rol. Abr. Rest. 5. *Anon.* 2 Barnard. 237.

(154) *Mayor of Durham's Case*, 1 Sid. 33.

(155) *R. v. Morris*, 1 Ld. Ray. 338.

(156) *R. v. Nottingham*, 1 Sid. 31.

(157) *R. v. Holford*, 2 Barnard. 330. 350. *R. v. Wildman*, 2 Str. 879. *R. v. Nottingham*, 1 Sid. 31.

Or show
cause.

158. All writs of mandamus before the peremptory writ, command the defendant to do the act, or to show cause to the contrary, which warrants the return in justification of a refusal to do it. But it is not an objection on which it will be superseded, that the first writ or even the alias, omits the words, "or show cause;" for the very nature of such writs is to enforce performance of the act, or the showing a good reason why it shall not be done. It was said that these words were first introduced in *Bagg's case*, but have been omitted in many cases since.

Teste.

159. The writ must bear teste in term time, indeed, on the very day on which the rule is made absolute. If it bear teste out of the term in which it was granted, it is supersedable, and the Court will take judicial notice of the end of the term.

Return.

160. There must be eight days between the teste and return, if the party whose duty it is to obey, live within forty miles of London, but if he live at a greater distance, there must be fourteen days between the teste and return. Of these days one is inclusive and the other exclusive, so that if the writ be dated on the second, it must be returnable on the tenth or the sixteenth.

(158) *R. v. Owen*, 5 Mod. 315. S. C. Comb. 399. *R. v. St. John's*, 1 Vent. 549.

(159) *R. v. Dublin*, 1 Str. 540. *Sterling's Case*, 1 Sid. 304. S. C. 2 Keb. 91. *Anon.* 2 Salk. 434. *Anon.* 2 Barnard. 236.

(160) *Anon.* 2 Salk. 434. *R. v. Dover*, 1 Str. 407. et n. General Rule, 11 Mod. 64.

SECTION III.

PROCEEDINGS BEFORE RETURN.

161. The mandamus ought to be served upon him *Service.* who is to make the return, and if directed to a Corporation it ought to be served upon the mayor.

162. But it has been held that a personal service on the town clerk alone of a peremptory mandamus to the Corporation, was sufficient to found an application for an attachment.

163. An objection to the form of the writ may be taken *Objections.* before the time for making the return has expired ; but if neglected until after that time the Court will not supersede it until a return is made, unless for gross faults, or because it issued erroneously.

164. An objection may be taken after the return on demurrer, although the return is bad, indeed at any time before the peremptory mandamus has issued. The direction of a writ was questioned, in discussing the validity of an election under it, and although the Court did not determine the case on this objection, Lord Ellenborough C.J. dwelt long upon it : however it would seem that if the proper persons have obeyed, no objection should afterwards be allowed. It should be remarked,

(161) *R. v. Exeter*, 12 Mod. 251.

(162) *R. v. Fowey*, 4 D. R. 614.

(163) *R. v. Norwich*, 1 Str. 55. *R. v. Tregony*, 8 Mod. 112. *R. v. Willingford*, 2 Barnard. 132. *R. v. Whitchurch*, 2 Barnard. 447. *Whitwood v. Jocam*, Selw. N. P. 1076. *R. v. Kingston*, 8 Mod. 210. S. C. 11 Mod. 382.

(164) *R. v. Kingston*, 8 Mod. 210. S. C. 11 Mod. 382. *R. v. Ward*, 2 Str. 897. *R. v. Smith*, 2 M. S. 598. *R. v. Margate*, 3 B. A. 223.

that in the case of Smith, the Corporation derived their authority to elect from the command of the Court.

165. If, upon the objection, it appear that the writ is insufficient in substance, as in the omission to state a material fact, or if there be a material variance from the rule upon which it has issued, it will be superseded or quashed: but if the objection be in form only, it may be amended by leave of the Court.

166. But the writ will not be superseded on motion supported by affidavits, on a ground on which it is contended that it ought not to issue; in this case the defendants will be put to make their return. So where the writ had commanded the delivery of the corporate documents, under the term *evidentias*, the Court refused to quash the writ, as being too general, but required a return to be made, when the defendant might take his exceptions.

Ancient
manner of
compelling
return.

167. According to the ancient practice, if a return was not made in due time to the original writ, an alias issued, and a pluries returnable immediately, and if no return was made to that, on affidavit of service an attachment, was obtained against the defendant for disobedience to the process of the Court. And it was held that a return to the original writ might be filed after the issuing of the pluries, if attended with no damage to the plaintiff, although in strictness the return ought to have been made to the pluries.

(165) *R. v. Margate*, 3 B. A. 224. *R. v. Kingston*, 1 Str. 578. S. C. 11 Mod. 382. *R. v. Wildman*, 2 Str. 880. *R. v. Water Eaton*, 2 Smith, 55.

(166) *R. v. Whaley*, 2 Str. 1139. *R. v. Nottingham*, 1 Sid. 31.

(167) *Anon.* 2 Salk. 434. *Da Costa v. Russia Comp.* 2 Str. 783. *Anon.* 11 Mod. 265.

168. "When any writ of mandamus shall issue out of the Court of Queen's Bench, the Courts of Sessions of counties palatine, or out of any of the courts of grand sessions in Wales, in any of the cases aforesaid (where persons who had a right to the offices of mayors, bailiffs, portreeves and other offices within cities, towns-corporate, boroughs or places within England and Wales, or to be burgesses or freemen thereof, have been *turned out* of the same, or have been *refused to be admitted* thereto), such person or persons who by the laws of this realm, are required to make a return to such writ of mandamus, shall make his or their return to the first writ of mandamus." Return to first writ under stat.

169. "The said Courts respectively may allow such person or persons to whom such writ of mandamus shall be directed, or to the person or persons who shall sue or prosecute the same, such convenient time respectively, to make a return, plead, reply, rejoin or demur as to the said Courts respectively, shall seem just and reasonable."

170. "Where any writ of mandamus shall issue out of the Court of King's Bench in any of the cases (under this statute) the person or persons to whom such writ shall be directed, shall make his or their return to the first writ."

171. Since the statute of Anne, the Court will not drive the prosecutor to the alias and pluries, even in In other cases.

(168) 9 Ann. c. 20. s. 1.

(169) *Ib.* s. 6.

(170) 11 Geo. I. c. 4. s. 9. V. Part II. tit. 52. 62.

(171) *Coventry Case*, 2 Salk. 429. *De la Costa v. Russia Comp.* 1 Barnard. 24. S. C. 2 Str. 783. *Fitzgib.* 4. *R. v. Bettsworth*, 2 Str. 857.

cases not within its provisions ; but compel a return to the first writ.

Return filed
after death
of defend-
ant.

172. After the expiration of the time when the return ought to be filed, the prosecutor may call upon the proper officer to make it at any time ; and if that officer die, having executed the return but not filed it, the Court may direct an issue to try its validity, and if found duly made, cause it to be filed ; yet it is doubtful whether the Court will grant leave to file it after the officer's death, on disclosure of that fact. Perhaps it will be allowed to be filed, if it conclude the rights of such officer alone, but not if it conclude the rights, or aver the consent of others, since neither an action, nor an information can be sustained to falsify it.

How to
compel a
return.

173. The manner of compelling a return is by application to the Court upon an affidavit of service for a peremptory rule to return the writ, the exigency of which is according to the distance of the place ; for it is not a four-day rule, but if to be obeyed in London, it may be granted to make the return instant, when a return must be made on the following day.

Time al-
lowed.

174. The Court will allow time to make the return on a reasonable suggestion of difficulty, and the necessary investigation of documents, to ascertain whether the defendant ought to return performance of the act commanded by the writ, or whether he have sufficient cause for refusing to do it.

(172) *R. v. Holmes*, 3 Bur. 1643—5.

(173) *Coventry Case*, 2 Salk. 429. *De la Costa v. Russia Comp.* 1 Barnard. 24. S. C. 2 Str. 783. *Fitzgib.* 4. *R. v. Bettesworth*, 2 Str. 857. 783. *V. Impey*, Mand. 116.

(174) *Archbp. of Canterbury v. Trinity College*, 2 Barnard. 194.

SECTION IV.

RETURN.

I. GENERAL REMARKS.

175. The return must be made by the Corporation, ^{By whom made.} select body, or individuals to whom the writ was directed. If the mayor in possession of the office at the time be only a mayor de facto, he must nevertheless join in the return. And if a writ be issued to the mayor or bailiff of B. at the time A. is mayor or bailiff of B. (without mentioning the name of A.) the return must be made by A. although C. has intermediately attained the office; at least, if the command of the writ were to admit C. to the office of mayor or bailiff, so that the office of A. is determined by the very act of obedience to the writ.

176. It has been held that if the writ be directed to the mayor, bailiffs and burgesses (this was not the corporate name), the Court cannot refuse to file the return which is brought to them by the mayor, although a motion is made to oppose the filing of it, supported by the affidavits of some of the burgesses, stating that the return is contrary to the resolution of the majority of the bailiffs and burgesses; and that the burgesses cannot be allowed in this manner to come in and disavow the return, because the mayor is the head of the

(175) *Manaton's Ca.* T. Ray. 365. *Steven's Ca.* T. Ray. 432. *Knight v. Wells*, 1 Lutw. 519. *R. v. Lisle, Andrews*, 173. *R. v. Clithero*, 6 Mod. 133.

(176) *R. v. Abingdon*, 12 Mod. 308. *S. C.* 2 Salk. 431. *S. C.* Carth. 499. *R. v. Norwich*, 2 Salk. 432. *Powell v. Price*, Comb. 41. *Sed. vid.* *R. v. Hoskins*, C.T. H. 188.

Corporation. It was said also that the return is not good if made by the mayor without a majority of the burgesses, nor if made by a majority of the burgesses in opposition to the mayor, and on this ground the Court refused to deliver the writ to the burgesses, that they might make a different return.

177. I apprehend that where the writ is to others besides the mayor, the only legal return is that which is made by a majority of the votes of those to whom it is directed, at an assembly duly convened, as for any other corporate business, and that it is quite immaterial whether the mayor or any other principal officers vote in favor of or against it. The mayor I consider to be merely a ministerial officer in forwarding the return, and that if he substitute one different from that which the majority sanction, either by their direction or acquiescence; after their disavowal no action can be sustained against them for a false return, and of course that no proceedings can be had upon the return under the statute: and therefore that on the disavowal of the majority the Court will not allow the mayor's return to be filed, but will accept one made by them through the medium of another officer, and grant a criminal information against the mayor.

How made. 178. The Court will not direct how the return shall be made or altered, but after it has been filed will allow proper alterations to be made with the consent of both parties, that the question may be brought forward in the most convenient form. And for this purpose, on the application of the prosecutor, they will order that the

(177) Vid. Part I. tit. 133. et seq.

(178) R. v. Marriott, 1 D. R. 167.

defendant shall be at liberty to amend his return, so as to raise the proper question for the opinion of the Court, if he think fit.

179. It must be certain upon a fair and reasonable construction, without recurring to possible facts which do not appear; it is said that the same certainty is required as in indictments and returns to writs of habeas corpus. The reasons assigned are, that the party may have sufficient ground to support an action for a false return, and that the Court may form a plain conclusion to warrant their judgment from what appears on the face of the proceedings. It was formerly added, as a further reason for requiring this certainty, that the other party had no opportunity of excepting to it by a counter plea; but it has been held that the same certainty is still necessary, although the statute of 9 Anne has afforded this opportunity, by giving the prosecutor a plea to the return. Yet where presumption and intendment are admitted, it will be in favour of the return, and not to show it insufficient. Must be certain.

180. The return must state facts and not conclusions of law; therefore if the writ aver that the prosecutor was elected, the return must deny the fact of election, or show how the circumstances of the pretended election differ from those which are necessary to a valid election according to the form of the constitution, that the Court may decide on its legality. So all the facts of an amotion must be distinctly shown, that the Court State facts.

(179) *R. v. Abingdon*, 12 Mod. 401. S. C. 1 Ld. Ray. 560. S. C. 2 Salk. 432. *R. v. Sterling*, Say. 175. *R. v. Lyme Regis*, Doug. 153, 154.
 (180) *R. v. Liverpool*, 2 Bur. 731. *R. v. York*, 5 T. R. 76.

may judge of its sufficiency both as to the cause and the form of their proceedings.

Not argumentative,
&c.

181. It must not be argumentative, denying the facts alleged in the writ by implication only; but must aver the grounds of defence precisely and positively, and not even by way of recital. Therefore it ought to say that A. was not elected, &c. and it is insufficient to say "it does not appear to us that he was ever elected," or "we do not know that he was ever elected," &c. So in showing a custom, it must assert positively that there is such a custom, and not introduce it by way of recital, as by averring that "King James, by his letters patent, reciting that they had a custom to elect any one to be of the common-council, and to remove him ad libitum, confirmed the said liberties, &c. and by force of the said custom, time whereof, &c. used, and according to the form of the said letters patent, they removed." So it is insufficient to aver that another person had 18 votes, and the prosecutor only 17, at the election, for this is argumentative.

182. If the return set forth a constitution different from that shown by the writ, it must expressly negative it. If therefore the writ aver that the bailiffs ought to be elected from among such aldermen as had not been bailiffs within three years; the return must expressly deny the exclusion, it is insufficient for it merely to state that they are eligible from among the aldermen generally, nor is it helped by the additional words "in accordance to the form and effect of the letters patent."

(181) *R. v. Winchelsea*, 2 Lev. 86. *R. v. Hereford*, 6 Mod. 309. *Basset v. Barnstaple*, T. Ray. 153. S. C. 1 Sid. 286. *R. v. Coventry*, 1 Ld. Ray. 391. S. C. 2 Salk. 430. *R. v. Ilchester*, 4 D. R. 330.

(182) *R. v. Malden*, 1 Ld. Ray. 481. S. C. 2 Salk. 431.

because that is but a repetition of what they have stated to be the form prescribed by the letters patent.

183. Yet the denial may be composed of several assertions ; for an assertion that the prosecutor was not admitted at the time of his election, nor since that time, nor is yet admitted, is equivalent to an assertion that he has never been admitted up to the time of the return, and does not relate only to the period at which the writ issued.

184. If the return rely upon a misdirection of the writ, it must assert positively that it is misdirected, and show in what manner. If a return be made to the allegations in the writ generally, and merely conclude that they were never incorporated or known by that name, it is insufficient ; particularly if the return profess to be in obedience to and execution of the writ, and show that the Corporation has been known by several names, without setting them forth.

185. It must assert, deny or answer all material facts in their full extent, substantially, and not by mere ambiguity of words. Therefore if the averment be of an election, a return not elected *at* the time of receiving the writ is insufficient, for it denies only that an election took place at the moment of receiving the writ : so if the writ, founded on the possession of an office *de facto*, assert that A. was elected, admitted *and* sworn, it is not sufficient to reply not elected, and admitted *and*

Must answer the writ in substance.

(183) R. v. King's Lynn, Andr. 105.

(184) R. v. Ipswich, 2 Ld. Ray. 1239. S. C. 2 Salk. 435.

(185) R. v. Clapham, 1 Vent. 111. S. C. R. v. President des Marches, 2 Lev. 86. R. v. Coventry, Salk. 430. R. v. Ilchester, 4 D. R. 330. R. v. Lyme Regis, Doug. 79. 85.

sworn; but it was said that not elected, or admitted or sworn, might have been good, for if deficient in all these essentials to a legal title, the applicant had never been even an officer de facto, which is sufficient to preclude the grant of a peremptory mandamus to be restored, although the return is otherwise defective.

186. So if it attempt to show an incapacity to obey the writ by reason of the change of circumstances, it must appear that there was no fraud or stratagem on the part of the defendant. Therefore to a writ to admit the prosecutor to the office of mayor, directed to "A. B. mayor &c." it is an insufficient return that he A. B. was on a day before the issuing of the writ *amoved* from the office of mayor and another elected in his stead, whereby he could not admit, for if the election of the prosecutor be legal, it precludes the substitution of another mayor before his admission, and the return having the color of fraud on the face of it, a peremptory writ will go to A. B. to admit the prosecutor.

Must show
their power
of amoving,
&c.

187. The return must aver the existence of all powers which are necessary to warrant the act upon which the defendants rely, as a cause for not performing the commands of the writ, unless they are incidental to the body by whom it was done, or incidental to the possession of another power which it has already shown. Thus to a mandamus to restore, the defendants relying upon the validity of an amotion, must if a *select* body show by what custom, charter or by-law they have power to amove; but having shown their power to amove, they need not set forth their authority to hold a Court for

(186) R. v. Stevens, T. Jones, 177. S. C. T. Ray. 432. Manaton's Case, T. Ray. 365.

(187) R. v. Lyme Regis, Doug. 153.

the purpose of amotion, for that is incidental to the power of amoving. And so if the writ be to the Corporation *at large*, it is not necessary to show specially how the power of amotion became vested in them, because it is incidental to them as a body corporate.

188. It is not necessary to negative possible facts, so that if the defendants rely upon an amotion, being the body *at large*, without showing how they were invested with the power of making it, it is equivalent to an averment that such power is reposed in them, for this is implied by law; and it is unnecessary to aver that there is no charter &c. by which that power is transferred to a select body. If such a return being sufficient on the face of it be allowed, as was the cause at common law, the concealment of a charter so transferring the power would be as much a false return, and warrant an action, as an express denial; for the return, though it have the semblance of truth, is not true in substance; and therefore since the statute, the prosecutor may show in his plea, that this power has been transferred to a select body, and if found for him, a peremptory writ must be awarded.

Need not
negative
possible
facts.

189. If the return rely upon a judgment, it is unnecessary to state the proceedings on which it is founded, for as long as it remains unreversed, no enquiry can be instituted concerning them under this form of action, except for the purpose of showing fraud and collusion, however faulty they may have been; if the judgment were erroneous, the proper mode of correcting it is by bringing a writ of error.

Need not
set forth
proceed-
ings on
which a
judgment
founded.

(188) R. v. Lyme Regis, Doug. 153, 154. Braithwaite's Ca. 1 Vent. 19.

(189) R. v. West Riding, 7 T. R. 467. R. v. Suddis, 1 East, 315.

190. It is not necessary that every part of the return should be sustainable: but it is sufficient, if upon the whole it disclose a fair legal reason, why the writ should not be obeyed, although certain parts are unsatisfactory; for these parts may be treated as mere surplusage, or the Court may disallow them, and send down the rest to be tried.

May be
double.

191. The return need not be single, for it was never subjected to the ancient strict rules of pleading, but may assign several causes for refusing to perform the act commanded by the writ, so they are consistent with each other, and imply no contradiction. If one only of these be sufficient in law to warrant the refusal, the return will be allowed as to that, though it must be quashed as to the remainder which are merely superfluous. The return to a writ to admit to the office of alderman, may state "that the prosecutor was not a burgess (a necessary qualification), that he was not eligible to be an alderman, and that he was not elected an alderman;" which causes are not inconsistent with each other, and any one of them, if true, is a sufficient answer to the writ. So it may state that the prosecutor "was elected but refused by those who had the right of approving, and that he had not received the sacrament," for each alternative admits a formal election, which the former shows insufficient, though it had been legal, and the latter avoids for a legal defect.

Inconsistent
returns.

192. But where two or more inconsistent causes are stated, the return must be quashed altogether, for

(190) *R. v. Cambridge*, 2 T. R. 461. *R. v. York*, 6 T. R. 495. *R. v. Bristol*, 1 Show. 288.

(191) *R. v. Norwich*, 2 Ld. Ray. 1244. *Wright v. Fawcett*, 4 Bur. 2044. *R. v. Cambridge*, 2 T. R. 461.

(192) *R. v. Pomfret*, 10 Mod. 108. *R. v. Norwich*, 2 Ld. Ray. 1244. *S. C.* 2 Salk. 436. *R. v. Cambridge*, 2 T. R. 461. *R. v. York*, 5 T. R. 74.

though one or more of them may be true, and sufficient if standing alone, the return *must* be false when taken collectively. The Court cannot know which part to believe, and will not allow so great an irregularity, although the prosecutor may, since the statute, have an opportunity of traversing each of them. On this ground the return must be quashed if it state that A. *was elected*, but refused by those who had the right of approving, that he had not received the *sacrament*, that he was turbulent and factious, and procured *his election* by bribery—and that he was *not elected*; for although some of those causes are consistent, and if true sufficient; yet as some admit an election, and others deny it, there is an evident falsity. So a return must be quashed which asserts that the prosecutor was elected and admitted, and amoved for non-attendance at the sessions, and that he had not received the sacrament, and therefore his election was void; for one admits an election, which the other denies. It may be observed that the falsity of these returns, is in construction of law and not in fact; for it appears that there was a formal election, but voidable by reason of the prosecutor not having received the sacrament, and that the return was devised in these terms, from a doubt entertained by the defendants, whether the election were on that account voidable only or absolutely void, and therefore, as they called it, no election.

193. If a return be made by individuals, their signatures to it are not necessary, nor is it requisite that the return of a Corporation have the signature of the mayor

Return
needs not
signature
or seal.

(193) R. v. Chalice, 2 Ld. Ray. 848. Thetford Ca. 1 Salk. 192. R. v. St. John's Col. 4 Mod. 241. Powel v. Price, Comb. 41. Lidleston v. Exeter, Comb. 422. S. C. 12 Mod. 126. S. C. 1 Ld. Ray. 223. R. v. Holmes, 3 Bur. 1644. 12 Ed. II. st. 1. c. 5.

or the corporate seal ; for such acts of a Corporation are in the nature of records, and returns by mayors, coroners &c. are not within the statute of York, which requires the signature of the sheriff to his returns.

Cancelled
after filing.

194. After a return has been filed the Court will not allow it to be taken off, even on the application of both parties ; but when the parties applied to the Court for that purpose, on the ground that it was false and scandalous, they directed that it should be dashed through as though it were cancelled.

Taking off
the file.

195. There was an application by a Corporation to have a return taken off the file, on the ground of having been filed since the death of the mayor, who was said to have made it, and that it concluded the consent of the majority of the Corporation, as it could not be falsified by action or information, on account of the mayor's death. The Court hesitated, and afterwards it was agreed by the parties, under their direction, that it should remain on the file, but not be construed to conclude any besides the mayor who made it.

II. TO ELECT.

Showing
restriction
by charter.

196. To a mandamus to elect a mayor, the former having held over after his year had expired, the return stated, that by the charter they were empowered to elect a new mayor on the Tuesday next after Michaelmas-day in every year, and that the mayor so elected should continue in office until another should

(194) Widdrington's Case, T. Ray. 68.

(195) R. v. Holmes, 3 Bur. 1643—5.

(196) R. v. Tregony, 8 Mod. 113, 127. Vide Part I. tit. 531. R. v. Cambridge, 4 Bur. 2011.

be duly elected in *manner as aforesaid*, and then proceeded to say, that the last charter day had passed without a new election, and therefore they could not proceed to a new election until the next charter day, unless the present mayor should die or be removed. It was held that another mayor could not be elected until the charter day except in such cases, and therefore that the return was good. This case was before the statute 11 George, and the learned editor of this report, appears to be of opinion that the statute empowers the Court to compel an election in such cases before the charter day; but I apprehend that it is restrained by the preamble to Corporations, in which the mayor has no power of holding over, and can only be extended to Corporations in which it is doubtful whether the chief officer have such power.

197. To a mandamus to elect, by which it appears that the constitutional number of aldermen is fifteen, that an election must be made at an assembly of a majority of such number, it is an insufficient return that there are not eight aldermen who were legally *elected*, and therefore they cannot elect; because although there are not eight whose titles were originally unimpeachable, there may be eight or more, of whom the titles of some were originally good, and those of others, though at first voidable, are now become unimpeachable by the operation of the indemnifying statutes.

Incapacity
to elect.

198. To a mandamus to elect under this statute, if the return rely upon an election on the day after the

Election
under 11
Geo.

(197) *R. v. Monmouth*, 1 B. A. 49. 5 Geo. I. c. 6. 32 Geo. III. c. 58. and Indemnity Act.

(198) 11 Geo. I. c. 4. s. 6. *R. v. Morgan*, 7 Mod. 323. V. Part I. tit. 111.

charter day or the following Monday, there having been an omission on the charter day, it must show all the circumstances essential to such an election, and aver that A. the person *nearest* in place or office presided; an averment that A. *one of the nearest* in place presided is not sufficient.

Office full,
&c.

199. To a mandamus under this statute, to the steward of a court leet, commanding him to summon a jury to elect and swear in a portreeve, the return is sufficiently positive and certain, if it state that he has held a Court, empannelled a jury, and charged them to elect and swear some person into the office of portreeve; that the jury found that A. was already duly elected and sworn into that office on the charter day, and that therefore no person could be elected and sworn into the office as the writ commands. And this is sufficient to preclude the issuing of a peremptory writ. So if he were commanded to direct them to present B. whom the writ asserts to have been elected, the return may be that the jury find that he was not elected.

III. TO ADMIT.

Ouster in
quo war-
ranto.

200. To a mandamus to admit, it is a sufficient return to show that the prosecutor has been ousted in quo warranto, subsequently to his acquiring the title upon which he relies; and this return is conclusive, although the ouster was for want of admission alone, the prosecutor's election having been legal.

(199) R. v. Williams, Say. 141. R. v. Willis, 7 Mod. 262.

(200) Vid. Quo Warranto, Judgment. R. v. Serle, 8 Mod. 332. S. C. R. v. Hull, 11 Mod. 391. R. v. Taylor, 7 Mod. 172.

201. An averment that the prosecutor has *not* been *Not elected.*
elected is a sufficient answer to the general allegation in the writ, that he has been elected; but an averment that he has *not* been *duly* elected is insufficient, for this puts no fact in issue, but admits that there has been an election, yet asserts that it was not according to the constitution of the Corporation, and therefore in such case it ought to show how he was insufficiently elected. Yet if the writ alleged that he has been *duly* elected, a return that he has not been *duly* elected is sufficient, for it fully answers the suggestion of the writ.

202. But the better opinion seems to be that it is quite immaterial whether the word *duly* be introduced or omitted, for if it be not a *due* election, it cannot be considered *any* election so as to afford the prosecutor the benefit of this writ; and as a *due* election is implied in an averment of an election, so the word "*duly*" ought not to injure if introduced in the denial of that fact.

203. If the writ set forth certain facts, and conclude by reason whereof the prosecutor was elected, the return must not aver that the prosecutor was not elected; for that is an admission of the facts in their fullest extent, and a denial only of the legal inference; but it ought to traverse some material fact, on the truth of which the election is founded. Or if all the facts be indisputable, and yet not sufficient to support the election, it must

Must tra-
verse facts.

(201) *R. v. Ward*, Fitzg. 195. *R. v. Harwood*, 2 Ld. Ray. 1405. *Wright v. Fawcett*, 4 Bur. 2044. Co. Lit. 381. *Manaton's Ca.* T. Ray. 365. *Steven's Ca.* T. Ray. 432. *Hereford Ca.* 1 Sid. 209. *R. v. Cornwall*, 11 Mod. 174. *R. v. Lambert*, 12 Mod. 3. *S. C. Carth.* 170. *R. v. Chester*, 5 Mod. 11.

(202) *R. v. Lyme Regis*, Doug. 84.

(203) *R. v. York*, 5 T. R. 76. *R. v. Malden*, 1 Ld. Ray. 481. *S. C.* 2 Salk. 431.

negative the constitutional manner of election set forth in the writ, and show what circumstances are necessary to constitute a legal election.

Neglect to
receive sa-
crament.

204. If the defendant rely upon the invalidity of the prosecutor's election on account of his having omitted to receive the sacrament, and admit the fact of his election, the return must aver that he has not been elected at any other time, and then assert that he had not received the sacrament within the year preceding. It is insufficient to allege, that he *was* elected within a certain number of years after the passing of the statute of Charles, without having previously received the sacrament, for there may have been another election. Yet I apprehend that the return may be confined to a mere averment that he had not received the sacrament within the year preceding it, when a particular election is relied upon in the writ.

Oaths.

205. It is insufficient to aver that the prosecutor did not take the oath of allegiance *before* them, the mayor and bailiffs, for he might have taken it before two justices of the peace.

Neither
elected.

206. If the writ be granted to admit several persons to distinct offices, the return should deny the election of each of them, and a return that they were not elected is insufficient, for one may have a good title, although the other have none.

(204) R. v. Abingdon, 1 Ld. Ray. 560. S. C. 2 Salk. 432.

(205) 13 Car. II. st. 2. c. 1. s. 1. R. v. Oxon, 2 Salk. 429. S. C. R. v. Slatford, 5 Mod. 318. S. C. Comb. 420.

(206) R. v. Guise, 2 Ld. Ray. 1008. S. C. R. v. Twitty and Maddicot, 2 Salk. 434.

207. If the writ aver that the Corporation were duly assembled on a certain day and elected the prosecutor recorder, and the return admit a corporate meeting on that day, duly assembled for making other elections, it is not sufficient merely to aver that they were not duly assembled for the election of a recorder, but it is necessary to state some fact on account of which they were not competent to proceed to such an election. For the Court will not presume that the prosecutor's election took place on the same day at a different assembly from that which the defendant states, and that assembly is *prima facie* competent to make the election.

Assembly
insufficient.

208. A return that he was not elected *at the time* of the receipt of the writ is insufficient; for it is strictly true, although he were elected at any time before the moment the writ reached the defendant's hands, so that it does not with certainty deny the prosecutor's right; but if the writ assert that he was elected in Easter week, a return that he was not elected in Easter week, is sufficient, for the suggestion of the writ is answered in its full extent.

Election,
when.

209. If the Corporation have a right to judge of the sufficiency of the deputy of the prosecutor, the return may show this, and say that he is not a sufficient person.

Insufficient.

210. If the writ state that the prosecutor was duly elected, and that he thereby became entitled to be

Not elected
or approved.

(207) R. v. York, 5 T. R. 74, 75.

(208) R. v. Clapham, 1 Vent. 111. R. v. Penrice, 2 Str. 1235.

(209) R. v. Clapham, 1 Vent. 111.

(210) Wright v. Fawcett, 4 Bur. 2044.

sworn, it may be returned that he is not duly elected, and that he has not been approved by the lord of the manor showing that such approbation is by custom necessary before he is entitled to be sworn.

Non-pay-
ment of
fine.

211. If there be a fine payable before admission, the return may show that circumstance, setting forth the by-law &c. by which it is imposed, and aver that he has not paid it.

Inference
no aid.

212. If the return set forth an insufficient cause for not admitting a principal burgess, and conclude with "by which his election is become void, *and* he is not a principal burgess"—although the sentence "he is not a principal burgess," might have been sufficient had it stood as an independent averment, yet the word *and* shows that it is a mere inference from the preceding statement, and therefore cannot avail the defendant as a distinct assertion.

Office full.

213. It is not a sufficient return that the office is already full, for if the prosecutor had the prior title, the possessor is a mere officer *de facto* at the utmost; and if the title of the possessor is good, the prosecutor was never legally elected, there being no vacancy; upon which the return should rely. Moreover the Court does not grant the writ unless it appears that there was a vacancy at the time of the applicant's election.

Must be ad-
mitted of a
certain
company.

214. To a mandamus to admit to the municipal freedom, the return may show an ordinance that no person

(211) *Taverner's Ca.* T. Ray. 447.

(212) *R. v. Abingdon*, 1 Ld. Ray. 560. S. C. 2 Salk. 432.

(213) *R. v. Ward*, Fitzg. 195. V. II. 87.

(214) *R. v. Ludlow*, 8 Mod. 270. Vide Part I. tit. 361.

shall be admitted, but as a freeman of the company of his own trade, and that the prosecutor is not free of that company, but it must also aver that he is of such a trade, and carries it on within the municipality.

215. To a mandamus to admit, the return may show that there are certain days periodically appointed for such admissions, and that such persons are not admissible at any other time ; but it is insufficient if it omit to negative the right to be admitted at other times. Admissible on certain days only.

IV. TO RESTORE.

216. A mandamus to restore can be resisted only on the ground of a legal incapacity in the prosecutor, his having been ousted in quo warranto, having resigned, been amoved, or disfranchised.

217. It is sufficient to aver that the prosecutor has been outlawed ; and this return was allowed before the statute of Anne, although in fact the outlawry was reversed, unless both the judgment and reversal were recited in the writ ; for the Court will not judicially notice the reversal. Outlawry.

218. An ouster in quo warranto concludes the prosecutor, so that a mandamus will not be granted, and of course is a good return to one which may have issued erroneously. Ouster.

219. The return may state that the prosecutor in due manner resigned his office ; and this is sufficient, al- Resignation.

(215) R. v. Whiskin, Andr. 3.

(217) R. v. Bristol, 1 Show. 288.

(219) R. v. Rippon, 1 Ld. Ray. 563. S. C. 2 Salk. 432.

though a deed is necessary to the resignation; for all legal requisites are implied in such an averment, in so much, that if on an action for a false return it be shown that the resignation was by parol only, and that a deed is necessary, the return is falsified.

220. The averment must be in the same form if the resignation were merely a consent that he should be turned out, and an averment that he consented to be turned out is improper, for the legal effect, and not the form of words, should be set forth.

221. It is not necessary to show the authority of the body to accept a resignation, whether it be the Corporation at large or the body by which the officer was elected; for the body at large has an incidental right to accept the resignation of any of their officers, and the select body to accept the resignation of the office which themselves conferred.

222. But if the resignation be by mere implication, from acceptance of an incompatible office, the special matter must be shown; a general averment of a resignation is not sufficient.

Amotion.

223. The return of an amotion must show all those facts which are essential to a legal amotion, stating the circumstances positively, and not legal conclusions. Therefore it is insufficient merely to allege that the

(220) *R. v. Lane*, 2 Ld. Ray. 1304. S. C. 11 Mod. 270. S. C. Fort. 275.

(221) *R. v. Tidderley*, 1 Sid. 14.

(222) *Verrior v. Sandwich*, 1 Sid. 305.

(223) *R. v. Doncaster*, Sel. N. P. 1052. *Bruce's Ca.* 2 Str. 819. *R. v. Abingdon*, Salk. 482. *Bagg's Ca.* 11 Co. 99. *R. v. Liverpool*, 2 Bur. 731, 732. S. C. 2 Kenyon, 431.

prosecutor was duly amoved, but the return must show the cause of amoving, notice to the person amoved, that an assembly of the proper persons was duly held, the proceedings before them, a conviction of the offence, and an actual amotion by them.

224. Yet where the prosecutor was elected to hold the office during pleasure, it is sufficient to set forth that circumstance, and to state generally that he was duly amoved by them at whose pleasure he held, without assigning any cause.

225. It has been already shown what causes are and what are not sufficient to warrant an amotion: it remains only to point out how they must be stated in the return.

226. The particular acts which constitute the cause must be shown; it is insufficient to say "for removing servants of the Corporation who ought only to be displaced by the common-council," or "for obstinately and voluntarily refusing to obey orders and laws made by the mayor, aldermen and burgesses, for the good of the borough," without showing what were the laws, &c.* which he disobeyed: or that he has been guilty of a general neglect and omission of the duty of his office, without showing the particular instances of neglect and

Particular facts.

(224) *R. v. Thame*, 1 Str. 115. *Dighton's Ca.* 1 Vent. 77. 82.

(225) *Vide* Part I. tit. 648.

(226) *R. v. Wilton*, 5 Mod. 259. S. C. 12 Mod. 113. *R. v. York*, 2 Ld. Ray. 1566. S. C. *R. v. Doncaster*, Say. 39.

* Disobedience to by-laws is not a cause of amotion, but ought to be punished by a pecuniary penalty, and therefore setting forth those by-laws would not have made the return sufficient.

omission. For it is the province of the Court to determine whether the acts or neglect amount to the offence charged.

227. But the return was, that the recorder was in no manner skilled in the law, without showing particular instances of ignorance, and the Court held that the return was sufficient. But in this case the recorder was not a barrister, which the Court intimated he should have been.

Desertion
of the mu-
nicipality.

228. *Recessit, elongavit, et habitationem suam reliquit et deseruit, et amovebat seipsum et familiam suam ad Topsham extra civitatem, &c. et officium suum voluntariè reliquit et neglexit*, is a sufficient averment of a desertion of the municipality, and implies that he has never come back to reside.

229. If there be an express power to amove for non-residence, it ought to be set out according to the terms of the charter; and if confined to particular cases only, it must be shown that the conduct of the prosecutor came within the precise terms of the provision.

Offence
against the
office.

230. The return must show plainly that the office from which the prosecutor is amoved is that against which the offence was committed, where he holds more than one; this may be by express statement, or by necessary implication. But it is insufficient if it show only that he was a burgess (when in fact he was also

(227) *R. v. Lord Hawley*, 1 Vent. 145. S. C. 2 Keb. 770, 778, 796. S. C. *R. v. Coventry*, 1 Ld. Ray. 391.

(228) *Exeter v. Glyde*, 4 Mod. 36. S. C. 12 Mod. 28.

(229) *R. v. Shrewsbury*, 7 Mod. 202.

(230) *R. v. Lyme Regis*, Doug. 173, 177. *R. v. York*, 2 Ld. Ray. 1566.

a common-council-man), and setting out an amotion from his office, show only a sufficient cause for amoving common-council-men, although it appear that *some* of the burgesses were common-council-men : it were otherwise if it show that *all* the burgesses were common-councilmen.

231. When the officer is amovable at pleasure, the defendants in their return should rely upon the determination of their pleasure, and not allege any other cause ; for if they allow it to appear that he has a kind of freehold, and set forth an insufficient cause of amotion, he shall have a peremptory writ to be restored.

Officer at will.

232. If the power of amoving be in the Corporation at large, it is unnecessary to set forth their authority, for the law implies it ; but if it be vested in a select body, it must be shewn how it became vested in them ; and it is not inferred from their enjoying the right of election. And they must show a sufficient power to remove from all the privileges and offices from which they have assumed to amove the officer.

Power, in whom.

233. The return must show a summons to every person who has a right to be present and vote on the proposed amotion, living within the municipality ; and this is not sufficiently averred by saying that they were in *due manner* assembled : yet there is an earlier case to the contrary.

Notice to them.

(231) *R. v. Campion*, 1 Sid. 14. *R. v. Ipswich*, 2 Ld. Ray. 1240. *R. v. Oxon*, Salk. 428.

(232) *R. v. York*, 2 Ld. Ray. 1566. *Symmers v. Regem*, Cowp. 503. *R. v. Faversham*, 8 T. R. 356. *R. v. Cambridge*, Fort. 203. S. C. 2 Ld. Ray. 1346.

(233) *R. v. Liverpool*, 2 Bur. 731. *R. v. Shrewsbury*, 7 Mod. 202.

Assembly
of them.

234. It must appear that those who have the power of amoving were duly convened for the purpose, but this is sufficiently alleged by saying that "the mayor *and major part of* the aldermen and common-council assembled and took the cause into consideration;" although it should have been that "the mayor, aldermen and common-council assembled," for the assembly of the majority is the assembly of the whole body.

Notice to
person
amoved.

235. In all cases where the officer is entitled to notice to appear and defend himself, the return must aver that such a notice was given him; and it is insufficient to state that they could not summon him, if it appear that he was within the municipality, although it is stated also that he concealed himself, and went armed, to prevent any one approaching him; but it must shew that they did what they could to summon him.

236. "We caused to be summoned," sufficiently avers that he was summoned; not so "we commanded the proper officer to summon him."

Dispensed
with.

237. If the return show an absence from the municipality amounting to a total desertion, it is unnecessary to aver a summons, but if it appear that he subsequently returned, then a summons should be shown.

238. But if it show that the prosecutor actually appeared before the assembly and made his defence against

(234) R. v. Shrewsbury, 7 Mod. 202.

(235) R. v. King's Lynn, Cunningsh. 98. R. v. Cambridge, Fort. 206. S. C. 2 Ld. Ray. 1348. R. v. Gaskin, 8 T. R. 209.

(236) Braithwaite's Ca. 1 Vent. 19.

(237) R. v. Exon, 1 Show. 365. S. C. R. v. Glyde, 12 Mod. 28. S. C. 4 Mod. 36.

(238) R. v. Chalke, 1 Ld. Ray. 225. R. v. Wilton, 2 Salk. 428. R. v. Gaskin, 8 T. R. 209.

the charge, this being a waiver of notice by him, no previous summons need be alleged.

239. It must show in certain the charges which were alleged against him, but it is sufficient to say that an information was exhibited to the "following effect, and that he was amoved for the misconduct and offences in the information and articles above mentioned," these offences having been set forth in a former part of the return. Charge preferred.

240. It must appear that the charge in the accusation on which the amotion is founded was proved against him on oath or confessed; it is not sufficient to state that he was present and did not deny it, or that he was called upon to show cause why he should not be punished, and that he neither denied the charge nor desired time to defend himself. Proved.

241. It must show that an amotion was made by the persons in whom the power is shown or implied to be vested; but if it be shown that the power is in the mayor and *aldermen, and such* burgesses as had been aldermen, it is sufficient to allege an amotion by the mayor and *burgesses, according* to the charter. Amotion made by proper persons.

242. It need not aver that the amotion was by instrument under the corporate seal, or that it was recorded in the public books, for if that be necessary, it is implied in a general averment that they amoved him. Form.

(239) R. v. Carlisle, 8 Mod. 103. S. C. Fort. 200.

(240) R. v. Carlisle, 8 Mod. 99. R. v. Wilton, 5 Mod. 258. S. C. 2 Salk. 428. R. v. Feversham, 8 T. R. 356.

(241) R. v. Feversham, 8 T. R. 356. Braithwaite's Ca. 1 Vent. 19. R. v. Doncaster, Say. 37. S. C. B. N. P. 205.

(242) R. v. Chalke, 1 Ld. Ray. 226. S. C. R. v. Wilton, 5 Mod. 258.

Office expired by new election to annual office.

243. To a writ to restore a common-council-man, it is sufficient to aver that they were eligible, and that he was elected on a day certain for a year, and that he continued for a year, and that at the expiration of the year on a day certain another was elected in his stead, whereby he was duly amoved; but if it omit to show the day on which the prosecutor and the successor were elected, it is insufficient.

To office at will.

244. It is sufficient to aver that the prosecutor was an officer during pleasure, and that upon due summons to elect they assembled and elected another into his place, and thereby he was removed; nor is the conclusion thereby (perinde) argumentative.

245. It has been held that a return, not amoved by us, is sufficient; but the reporter introduces a quære, whether it ought not to have been rejected as a negative pregnant.

That prosecutor was never in office.

246. The mandamus was to *restore* a burgess who had been amoved without being heard in his defence; the return was that he had not received the sacrament; and it seems that the Court considered it a sufficient return, as showing that he was never legally elected into the office; and therefore sufficient to preclude a peremptory mandamus to restore, although not a good cause of amotion. Sed quære.

(243) R. v. Chester, 5 Mod. 11.

(244) R. v. Thame, 1 Str. 115. R. v. Canterbury, 11 Mod. 404. S. C. 1 Str. 674.

(245) Lucas v. Colchester, in Hereford's Ca. 1 Sid. 210.

(246) R. v. Lambert, 12 Mod. 2. R. v. Lyme Regis, Doug. 85. R. v. Aldborough, 10 Mod. 102. Vid. Part I. 669. II. 185.

SECTION V.

SUBSEQUENT PROCEEDINGS.

247. Before the 9th Anne, the proceedings on the writ of mandamus terminated on the allowance of the return as sufficient in substance, and if it were false the prosecutor was obliged to resort to ulterior proceedings, such as an action for a false return, or an information, according to the circumstances of the case; but this being found inconvenient, the legislature at that time introduced a proceeding in the nature of a civil action by the following enactment:

Action for
false re-
turn.

248. "As often as for any of the cases aforesaid, any writ of mandamus shall issue out of any of the said Courts, and a return shall be made thereunto, it shall and may be lawful to and for the person or persons suing or prosecuting such writ of mandamus to *plead to or traverse* all or any of the material facts contained within the said return."

Plea, &c.

249. It seems that the prosecutor cannot demur to the defendant's return, (per Wilson arguen.)

Demurrer.

250. He has until the last moment of the term next after the return made to put in his traverse, which may be to every distinct fact in the return.

(248) 9 Ann. c. 20. s. 2. Vid. Part II. 168.

(249) R. v. Cambridge, 2 T. R. 460.

(250) Anon. 2 Barnard. 106.

251. A trial at bar cannot be moved for by the defendant until the prosecutor has put in his traverse to the return.

Replica-
tion, &c.

252. "To which the person or persons making the return shall reply, take issue or demur, and such further proceedings, and in such manner, shall be had therein for the determination thereof, as might have been had if the person or persons suing such writ had brought his or their action on the case for a false return,"

Issue and
trial.

253. "And if any issue shall be joined on such proceedings, the person or persons suing such writ shall and may try the same in such place as an issue joined in such action on the case, should or might have been tried."

254. It was held by the Court in the case of Newcastle, that under this clause of the statute, the prosecutor may, at his option, try the cause either in the place where the proceedings properly originated, or in Middlesex, where the return alleged to be false was filed. But that if all the material facts are alleged to have happened in another county, and issue be joined in that county, the prosecutor is precluded from issuing the venire to the sheriff of Middlesex.

255. "Whereas there at present exists in the counties of cities and of towns corporate within this kingdom,

(251) Anon. 2 Barnard. 106.

(252) 9 Anne, c. 20. s. 2.

(253) *Id.* *ibid.*

(254) *R. v. Newcastle*, 1 East, 116. *Cameron v. Gray*, 6 T. R. 363. *R. v. Oxford*, 2 Salk. 669. *Russel v. Succlen*, 1 Sid. 218.

(255) 38 Geo. III. c. 52. s. 1.

an exclusive right that all causes and offences which arise within their particualar limits, should be tried by a jury of persons residing within the limits of the county of such city or town corporate; which ancient privilege intended for other and good purposes, has in many instances been found by experience not to conduce to the ends of justice. In every action whether the same be local or transitory which shall be prosecuted or depending in any of his majesty's courts of record at Westminster, and in every indictment removed into the King's Bench by writ of certiorari, and in every information filed by his majesty's attorney or solicitor general, or by the leave of the Court of King's Bench, and in all cases where any person or persons shall plead to or traverse any of the facts contained in the return to any writ of mandamus, if the venire in such action, indictment or information be laid in the county of any city or town corporate in England, or *if such writ of mandamus be directed to any person or persons body politic and corporate*, that it shall and may be lawful for the Court in which such action, indictment, information or other proceeding shall be depending, at the prayer and instance of any prosecutor or plaintiff, or of any defendant to direct the issue or issues joined in such action, indictment, information or proceeding to be tried by a jury of the county next, adjoining to the county of such city or town corporate, and to award proper writs of venire and distringas accordingly."

Qu. the meaning of this?—If confined to bodies politic, a writ directed to the mayor or other part of a corporation is not within it.

256. Upon the issue elected or not elected, in mandamus to admit, the prosecutor must be prepared to prove in himself every qualification required by the constitution, such as being an inhabitant or a burgess. He

Proof of election.

must prove also that he has complied with the provisions of the statute, as that he has received the sacrament, although no objection was made on that account, at the time of the election, and the defendant has not given him any notice that he will be required to do so; nor is he relieved from the necessity of doing so by the expiration of six months since his election, for the statute of George does not confirm his title before admission.

New trial. 257. The Court will grant a new trial, although the verdict for the prosecutor of this writ is not conclusive of his right, since he may be ousted on *quo warranto* after an admission, or again amoved after a restoration under the peremptory mandamus. And it will be awarded on the ground that the former trial was against evidence, although it was at bar.

Judgment,
costs, &c.

258. "In case a verdict shall be found for the person or persons suing such writ, or judgment given for him or them upon a demurrer or by *nil dicit*, or for want of a replication or other pleading, he or they shall recover his or their damages and costs in such manner as he or they might have done in such action on the case for a false return, such costs and damages to be levied by *capias ad satisfaciendum*, *fieri facias* or *elegit*; and a peremptory writ of mandamus shall be granted without delay, for him or them, for whom judgment shall be given, as might have been if such return had been adjudged insufficient. And in case judgment shall be given for the person or persons making such return to such writ, he or they shall recover his or their costs of suit, to be levied in manner aforesaid."

(257) *Musgrave v. Nevinston*, 1 Str. 585. S. C. 2 Ld. Ray. 1360. *Gay v. Cross*, 7 Mod. 37. *Smith d. Dormer v. Parkhurst*, 2 Str. 1105.

(258) 9 Anne, c. 20. s. 2.

259. The damages must be found by the jury who try the cause, for they are consequential on the issue, and not merely incidental, on which account they cannot be ascertained by an inquisition. If there have been an omission in this respect, no judgment can be entered on the original proceeding, because the form of the entry is, that the prosecutor recover damages and his costs, and of course no peremptory writ can issue, for that proceeds upon a rule awarded to the prosecutor, founded upon the judgment. But a venire de novo may be awarded.

Damages,
by whom
found.

260. Judgment as in case of a nonsuit will be given if the prosecutor do not proceed to trial after a traverse of the return, and issue joined on the traverse ; for the statute has expressly provided that if any material fact contained in the return be traversed, such further proceedings shall be had thereupon, as if the action had been brought for a false return, and therefore it must be treated as an action between party and party.

Judgment
as in non-
suit.

261. If the Court decide against the prosecutor on a traverse to the return, judgment must be entered for the defendant.

On tra-
verse.

262. "Where any person shall be entitled to be admitted a citizen, burgess or freeman of any city, town corporate, borough, cinque port or place within England and Wales, and shall apply to the mayor or other person, officer or officers of such city, town corporate, bo-

Costs of
prosecutor.

(259) *Kynaston v. Shrewsbury*, 2 Str. 1052. S. C. 4 Bro. P. C. 271. S. C. C. T. H. 153.

(260) *Wigan v. Holmes*, Say. 110. *R. v. Stafford*, 4 T. R. 689.

(261) *Green v. Durham*, 1 Bur. 133.

(262) 12 Geo. III. c. 21. s. 1.

rough, cinque port or place, who hath or have authority to admit citizens, burgesses and freemen therein, to be admitted a citizen, burgess or freeman thereof, and shall give notice specifying the nature of his claim to such mayor or other officer or officers, that if he or they shall not so admit such person a citizen, burgess or freeman within one month from the time of such notice, the Court of King's Bench will be applied to for a writ of mandamus to compel such admission, and if such mayor or other officer or officers shall after such notice refuse or neglect to admit such person, and a writ of mandamus shall afterwards issue to compel such mayor or other officer or officers to make such admission, and in obedience to such writ, such person shall be admitted by the said mayor or other officer or officers a citizen, burgess or freeman of such city, town corporate, borough, cinque port or place, then such person shall, unless such Court shall see just cause to the contrary, obtain and receive from the said mayor or other officer or officers so neglecting or refusing as aforesaid, all the costs to which he shall have been put in applying for obtaining and serving such writ of mandamus, and enforcing the same, by a rule to be made by the Court out of which such writ shall issue for the payment thereof, together with the costs of applying for obtaining serving and enforcing the said rule; and if the rule so to be made shall not be obeyed, then the same shall be enforced in such manner as other rules made by the said Court are or may be enforced by law."

Rule discharged without costs.

263. If the motion for a mandamus to elect be discharged, on a doubt whether the possessor of the office

is an officer de facto, or a mere intruder, it will be discharged without costs.

264. But if the motion be refused on the ground of there being another legal specific and adequate remedy, in clear cases the Court will compel the prosecutor to pay the costs. With costs.

265. If the writ be quashed on the ground of variance from the rule, the defendant will be allowed his costs on applying to the Court. Costs on writ quashed.

266. If on going to trial on his traverse to a return by the mayor and Corporation, the prosecutor withdraw the record on account of the absence of a material witness, whom he had subpœnaed, the defendants are entitled to their costs for not proceeding to trial; although the witness is a member of the Corporation, and absented himself without any reasonable excuse, unless it appear that his absence was caused by the act of or in collusion with the other corporators. Withdrawing record.

267. If the prosecutor recover costs and damages in this proceeding, the sheriff must levy his poundage also, for it is an action and within the statute of George. Sheriff's poundage.

268. If several join in the prosecution of a mandamus, their attorney may sue them jointly for the charges Joint liability for costs.

(264) Bul. N. P. 204. R. v. Chester, 1 T. R. 405.

(265) R. v. Kingston, 11 Mod. 382.

(266) R. v. Yarmouth, 5 B. A. 532.

(267) 43 Geo. III. c. 46. s. 5. R. v. Glamorgan, 2 Smith. 8.

(268) Green and fifteen others v. Pope, 1 Ld. Ray. 127.

of the proceedings, and maintain his action against the survivors for the whole, because their liability is joint.

Error.

269. Error does not lie on the allowance of the return to a writ of mandamus, nor on the disallowance of the return and award of the peremptory writ, for it is only in the nature of an interlocutory judgment.

270. But error lies on the modern form of action introduced by the statute, after judgment upon the return and subsequent pleadings, for that judgment is final.

271. On a mandamus to restore, if the jury do not find damages for the prosecutor, so that the Court cannot give a substantial judgment, if the case be brought before the House of Lords by error on a pretended judgment, they will remit it with a direction to the King's Bench to award a venire de novo.

SECTION VI.

AMENDMENTS.

Statutes of
jeofails, &c.

272. "An act made in the fourth year of her Majesty's reign entitled, an act for the amendment of the law,

(269) *R. v. Dublin*, 1 Str. 540. S. C. 8 Mod. 29. *R. v. Hearle*, 1 Str. 628. *Dublin v. Dowgate*, 1 P. Wms. 351. et n. *Dublin v. Regem*, 2 Bro. P. C. 554.

(270) *Ut. sup.* 269. *Kynaston v. Shrewsbury*, Str. 1052. *Dublin v. Dowgate*, 1 P. Wms. 350. *Dublin v. Regem*, 2 Bro. P. C. 554.

(271) *Kynaston v. Shrewsbury*, C. T. H. 153. S. C. 2 Str. 1052. S. C. 4 Bro. P. C. 280.

(272) 9 Anne, c. 20. s. 7. 4 Anne, c. 16. 32 H. VIII. c. 30. 18 Eliz. c. 14. 37 Eliz. c. 5. 21 Jac. I. c. 13. 16 & 17 Car. II. c. 28.

and the better advancement of justice, and all the statutes of jeofailes shall be extended to all writs of mandamus and informations in the nature of quo warranto and proceedings thereon, for any the matters in this act mentioned."

273. These statutes extend the power of the Court as to allowing particular amendments for the purpose of bringing precisely the same point before the jury with more form and certainty than the original pleadings would have exhibited it. But the Court, for the advancement of justice, have assumed an equitable jurisdiction, of permitting amendments which materially vary the question which is to be submitted to the consideration of the jury. This power extends to proceedings in mandamus and on the information in the nature of quo warranto, as well as other actions. Amendments in mere form, are allowed of course, such as alterations of clerical errors, and may be made in any stage of the proceedings. On the application to make substantial amendments, the Court does not so much consider the progress of the pleadings as whether the alteration will tend to the furtherance of justice, or whether it would merely tend to effectuate the sinister motives of the party.

At common law.

274. The writ may be amended on motion at any time before the return is filed, even, it seems, in a departure from the rule; but after a motion to quash the writ for such a departure, the Court will not allow the rule to be extended in this respect to warrant the writ, but

Of writ, when.

(273) Vide Part I. tit. 413. 418. Quo Warranto, Amendment. R. v. Gramppound, 7 T. R. 703, 4. R. v. Ellames, C. T. H. 42.

(274) R. v. Water Eaton, 2 Smith, 55, 56. R. v. Clitheroe, 6 Mod. 133.

the writ must be superseded, although the Court would have granted a rule to its full extent had it been desired on the application.

275. The writ had stated the custom of the borough relative to the admission of burgesses too narrow; a return had been filed and traversed; the plaintiff had neglected to proceed to trial at the next assize, and on the motion of the defendant, a rule had been made absolute for a judgment as in case of nonsuit; the prosecutor applied to amend his statement of the custom, but the Court refused leave, as the amendment was unprecedented, and put him to apply for a new writ.

New writ.

276. If the return be allowed upon its merits, the Court will not grant a new writ, although there is some want of form in the former; as if it be misdirected, for the return having been made, the prosecutor may bring his action for a false return against the individuals who made it, and they are precluded by their own act from excepting to the direction of the writ.

Return, clerical error in.

277. Amendments are not allowed in the return after it has been filed, unless they will evidently conduce to the furtherance of justice. Yet where they will have that effect, leave is not refused; the Court will therefore give a day to amend a misnomer or clerical error in it, on terms of short notice of trial, so that the prosecutor may not be damnified. So where the writ commanded to restore to the office and place of one of the common-council *and* one of the aldermen, and the return was, not elected and admitted to the office and place of one

(275) *R. v. Stafford*, 4 T. R. 690.

(276) *R. v. Rippon*, 1 Ld. Ray, 564. *Enfield v. Hills*, T. Jones, 116.

(277) *Widdrington's Case*, 1 Lev. 23. *R. v. Chichester*, 1 Show. 273.

of the common-council *and* of one of the aldermen, the defendant was allowed to amend, by adding "or either of them;" it having been only a mistake of the clerk of the crown-office, his instructions being general.

278. So the defendant will be allowed to amend the statement in his return, when it is not to introduce any alteration in substance, but is only for the purpose of correcting errors in its grammatical construction, so as to render it consistent and sensible. But upon an application for this favor, the Court will impose such terms as will conduce to the administration of justice, as by requiring the defendant to undertake, if an action for a false return should be brought, to take short notice of trial, and not to bring a writ of error if there should be judgment against him.

279. There had been a trial and verdict for the defendants on the following return: "that the borough of G. is an immemorial borough and corporation, that *the borough hath* immemorially consisted of a mayor, recorder, eight *capital* burgesses, inhabiting and residing within the borough, to advise the mayor touching the good rule and government of the borough, and the administration of justice, a *town clerk*, and an indefinite number of freemen, or free burgesses," &c. The Court having intimated an opinion of its insufficiency, on an application for a peremptory writ on that ground, the defendants applied for leave to amend and reduce it, by omissions, alterations and interpolations, to the following form—"that the borough of G. is an immemorial borough and corporation, that *in the borough aforesaid*

When material alteration.

(278) R. v. Lyme Regis, Doug. 131.

(279) R. v. Grampond, 7 T. R. 704.

there have immemorially been a mayor and eight of the burgesses of the borough aforesaid elected in manner hereinafter mentioned, inhabiting and residing within the borough, to advise the mayor touching the good rule and government of the borough, and the administration of justice, who during all the time aforesaid, have been and still are called capital burgesses of the said borough, and an indefinite number of freemen or free burgesses." The Court refused to allow the alteration. Lord Kenyon C. J. said, "Consider what this case is; the prosecutor who had attended all corporate meetings, and had in fact discharged all the duties of his office, was removed from his office of capital burgess for not residing within the limits of the borough; it seems therefore to be a harsh proceeding against him. We are not acquainted with the motives and reasons for removing the prosecutor; but perhaps it might have been convenient for some of the parties that the recorder should appear to be an integral part of the Corporation, and that this return, stating that the Corporation consisted of a mayor, recorder, eight capital burgesses, and a town clerk, should be on the files of the Court; probably this was an experiment to try whether or not that could be found by a jury, and now that they find that the averment bears against them in another point of view, they wish to have it altered. On reviewing the cases, it is manifest that the Court has seldom indulged the parties by permitting amendments to be made in a return to a mandamus after the mandamus has been filed. The ground on which my opinion is formed in this case is, that the amendments proposed are not for the furtherance of justice, and it is an attempt to carry the rule of amendment further than it has ever been extended in any other case. If the Corporation are still pertinacious, they may remove the prosecutor again, and then

they will have an opportunity of putting such a constitution of the Corporation on the record as they will abide by."

SECTION VII.

ACTION FOR FALSE RETURN.

280. If the return were sufficient in its statement, but false, before the statute of Anne the proceedings on the writ of mandamus were concluded, and the prosecutor had no immediate remedy on his writ; for the Court could not proceed to question its verity. At times, indeed, when they strongly suspected bad faith, they called upon the defendant to verify his statement in the return upon oath, a proceeding which had the approbation of Sir Matthew Hale, but was not in general acquiesced in by the judges. In questions where the public were more immediately concerned, the form of the subsequent proceeding was by criminal information; but when the question more particularly interested an individual, his only remedy was by bringing an action on the case for a false return. This action may be still resorted to in certain instances (for the statute is not applicable to all cases), although the more convenient form introduced by the statute has rendered it almost obsolete.

281. This action lies on a return either false in its direct assertions, or in the substance of its signification, When it lies.

(280) *Manaton's Ca.* T. Ray. 365. *Turner's Ca.* 1 Sid. 257. *Bagg's Ca.* 11 Co. 99. b. *Kynaston v. Shrewsbury*, 2 Str. 1053. *Rich v. Pilkington*, Carth. 171. *Bul. N. P.* 204.

(281) *R. v. Lyme Legis*, Doug. 153.

although the words which are used be in themselves true, by the concealment of any fact which counteracts that which is asserted, or even that which is necessarily implied : as if the return, relying upon an amotion by the whole body, do not show in whom the power of amotion is vested, so that the law intends it to remain in the body at large, and to warrant the disputed amotion, whereas in fact there is a subsisting charter within the knowledge of the defendant, by which the right of amoving is transferred to a select class.

282. In this action it is not material whether the mandamus ought originally to have been granted or refused, at least after a plea affirming the truth of the return it shall be taken pro confesso, that the writ was granted and the return made by the defendant, to falsify which the action is brought.

Action
when barred.

283. " If any damages shall be recovered by virtue of this act against any such person or persons making such return to such writ as aforesaid, he or they shall not be liable to be sued in any other action or suit for making such return."

284. It has been said that a judgment in the action under this statute, erroneous on account of the verdict being defective in the jury's having omitted to assess damages, is no defence to an action for a false return. But this means nothing; for the action cannot be brought unless the return has been *allowed*, and in this case, although the prosecutor has no benefit of his writ, the return is expressly *disallowed*.

(282) *Green v. Pope*, 1 Ld. Ray. 126.

(283) 9 Anne, c. 20. s. 3.

(284) *Kynaston v. Shrewsbury*, 2 Str. 1052. V. tit. seq.

285. It cannot be commenced before judgment on the sufficiency of the return has been actually entered upon the record, notwithstanding any rule of the office not to enter judgment on the return except in cases where a peremptory writ is awarded, for it is incumbent on the plaintiff to see that judgment on the sufficiency of the return is entered; and it is necessary that the fact appear by the declaration; an averment that he thereby lost his place will not remedy the omission.

When may
be com-
menced.

286. It can be brought only in the Court of King's Bench, so as to attain the object of the proceeding; for although judgment may be given upon it in the Common Pleas, the Court of King's Bench will not take judicial notice of that judgment upon motion for a peremptory writ. And therefore upon such a judgment no peremptory mandamus can be awarded, for it sets out with a statement that the return is false prout constat nobis per recordum. Yet it is not necessary that a judgment be formally entered when the proceedings were in the proper court, for the peremptory writ may be awarded on the postea.

In what
court.

287. If the proceedings on which it is founded be joint, the action may be brought by all jointly; indeed it is said, that if several were joint prosecutors of the writ, they must all join in the action for a false return, at least the survivors, when some are dead; for the peremptory mandamus which issues on judgment for the plaintiffs in this action must pursue the form of the

Joint ac-
tion.

(285) *Enfield v. Hills*, 2 Lev. 239. S. C. T. Jones, 116.

(286) *Green, &c. v. Pope*, 1 Ld. Ray. 128. S. C. Skin. 670. S. C. Anon. 2 Salk. 428. *Foot v. Prowse*, 2 Str. 698.

(287) *Ward et al' v. Brampton*, 3 Lev. 362. *Green and fifteen others v. Pope*, 1 Ld. Ray. 128. *R. v. Andover*, 2 Salk. 433. S. C. 12 Mod. 332. *Butler v. Rews*, 12 Mod. 349. *R. v. Montacute*, 1 W. B. 60.

original writ, and cannot be granted to one without the rest. But on a mandamus to restore several, it was held that they could not join in an action for a false return. Since the law on this subject has been better ascertained, the Court will not grant a mandamus to several, unless they jointly claim the same right; and if it be necessary to resort to an action for a false return on such a writ, I apprehend that all the prosecutors must join in the action for a false return, for the principle on which the writ would issue is, that their interest cannot be severed.

Against
whom.

288. Although the return is the return of the Corporation, in as much as the making a false return is of a tortious character, those who do it are liable for the consequences in their private capacity, and an action lies against them, or any one or more of them in their private names, to recover damages for the injury done to the prosecutor; and having made the return on which the action is founded, they cannot take advantage of the misdirection of the writ.

289. If the declaration state that the defendant, an alderman, caused the return to be made in the name of the bailiff and aldermen, &c. and the defendant show that he did it with their consent when duly convened in common-council, the plaintiff must be nonsuit; for it is the return of the mayor, aldermen, &c. and his declaration ought to have been against all those who joined in directing it to be made, for it was a corporate act; but

(288) *Enfield v. Hills*, T. Jones, 116. S. C. 2 Lev. 239. *R. v. Rippon*, 1 Ld. Ray. 564. S. C. Comyns, 86. *R. v. Challice*, 2 Ld. Ray. 849. *Rich v. Pilkington*, Carth. 171. Sed vide *Vaughan v. Lewis*, Carth. 229.

(289) *Vaughan v. Lewis*, Carth. 229. Sed vide *Rich v. Pilkington*, Carth. 171.

his action is sustained, although they all consented, if they were not convened in common-council.—The falsity was in asserting it to be the return of the bailiff and aldermen.

290. If several joined in the return, as a Corporation, the action may be brought either against all or any one of them; but if it appear that the defendant voted against the return, and it was made against his consent, which may be given in evidence on the plea of not guilty, the plaintiff must be nonsuit.

291. The action for a false return is local, but the venue may be laid either in the county in which the proceedings on which it is founded took place, or in Middlesex, where the offence is committed by placing the return upon record. Action local.

292. It is not necessary to aver that it was the duty of the defendants to obey the writ, for in as much as their return alleges a reason for not obeying the command, it is an admission of their duty, unless they show a sufficient excuse. Averment of duty.

293. It must be averred and proved to be the return of the defendant. Proof that the writ was delivered to him, and that it has such a return, is *primâ facie* evidence of this fact, and renders it incumbent upon him to show the contrary. Service of the writ on the de- Proof of defendant's return.

(290) *Rich v. Pilkington*, Carth. 171. *R. v. Rippon*, 1 Ld. Ray. 564.

(291) Vide Part II. tit. 254. *R. v. Newcastle*, 1 East, 116. *Lord v. Francis*, 12 Mod. 408. *R. v. Oxford*, 2 Salk. 669. *Russel v. Succlen*, 1 Sid. 218. *Cameron v. Gray*, 6 T. R. 363.

(292) *Norwich Ca.* 12 Mod. 322.

(293) B. N. P. 205. *R. v. Challice*, 2 Ld. Ray. 848. *Vaughan v. Lewis*, Carth. 229.

fendant, his declaration that a return should be made, together with a rule for an attachment against him for want of a return, and another to discharge that rule on payment of costs and appearance to the action, is evidence that the return was made by the defendant.

How set
forth.

294. It is sufficient to set out that the return was made modo et formâ sequenti.

Must shew
it false.

295. The plaintiff must falsify the return by showing his own title ; but where the writ was for the insignia of office, in so much as the return would not have been allowed had it relied on his not having received the sacrament, it seems to be unnecessary to show that fact in the action to falsify it.

296. If the plaintiff in his declaration state an election on the wrong day, but prove it on the right, his averment is substantially made out, for the allegation of the time is immaterial ; but if he lay it on the proper day, but prove it on a wrong, his action fails ; for the election is not valid. This was the case of an election of a chief officer on a day prescribed as the customary time of election.

Costs.

297. If the plaintiff obtain judgment, he is entitled to his costs under the statute of Gloucester ; if the defendant obtain it, he is entitled to them under the statute of James.

(294) Pullen v. Palmer, 1 Ld. Ray. 496. R. v. Powell, 2 W. B. 787.

(295) Crawford v. Powell, 2 Bur. 1016.

(296) Vaughan v. Lewis, Carth. 228.

(297) 6 Ed. I. c. 1. 4 Jac. I. c. 3. Tidd's Prac. 984. Hull, Costs, 327, 8.

SECTION VIII.

CRIMINAL INFORMATION.

298. A criminal information will be granted to punish corporators for making a false return, when it affects the rights of the public rather than those of any individual in particular, so that an action cannot be sustained against them. This cannot be moved for until the return has been filed and allowed; and must be framed against the offenders in their natural capacity, and not against the Corporation as a body, although the return were made under the corporate seal. When granted.

299. If the mayor make a return in the name of the Corporation, against the consent of the majority, a criminal information will be granted against him.

300. The applicant for the information, must allege that in his apprehension and belief, the party were led to make such return by corrupt and impure motives, and state circumstances raising strong suspicion, that such were their motives, or show circumstances from which such motives must be *necessarily* inferred. Affidavits.

301. If judgment be given against the defendants on the falsity of the return, they will be fined and a peremptory mandamus will be awarded. Peremptory mandamus on judgment.

(298) *R. v. Spotland*, C. T. H. 185. *R. v. Surgeons*, 1 Salk. 374. *R. v. Pettitward*, 4 Bur. 2453. *Anon.* 12 Mod. 559. *R. v. Lancaster*, 1 D. R. 485.

(299) *R. v. Abingdon*, 2 Salk. 431, 432. S. C. 12 Mod. 309. S. C. Carth. 499.

(300) *R. v. Williamson*, 3 B. A. 583. *R. v. Baron*, 3 B. A. 434.

(301) *R. v. Surgeons*, 1 Salk. 374. *R. v. Abingdon*, 2 Salk. 431, 432. S. C. 12 Mod. 308.

SECTION IX.

PEREMPTORY MANDAMUS.

On insufficient return.

302. If the return to the mandamus be disallowed by the Court, on account of insufficiency or inconsistency, a peremptory writ will be awarded, which requires an implicit obedience in doing the act commanded, without allowing any further opportunity of assigning a reason to the contrary; and is in the nature of a writ of execution to which the proper parties must return their act of obedience.

When not.

303. Yet, although the return is insufficient, if upon the whole it appear that the party ought not to have the advantage he claims, the peremptory writ will not be allowed to issue; as if on a mandamus to restore, it appear that the prosecutor was irregularly removed, but that if restored he ought to be immediately removed again on account of a sufficient cause of removal, as gross misconduct, or having created a continuing disability in himself to discharge the functions of the office. In one case the officer had been irregularly removed from the place of steward of the sheriff's court of Bristol, he was a magistrate of Shadwell, and bound to afford daily attendance at his office, so that he must either neglect his duty at Bristol, or his office in London.

304. But it will be granted where the body have

(302) *Steven's Ca.* T. Ray. 432. R. v. Norwich, 2 Ld. Ray. 1245. R. v. Ilchester, 4 D. R. 329. R. v. Cambridge, Fortes. 205.

(303) R. v. Campion, 1 Sid. 14. R. v. Axbridge, Cowp. 523. R. v. Griffiths, 1 D. R. 390. S. C. 5 B. A. 735.

(304) *Protector et R. v. Campion*, 2 Sid. 97. 1 Sid. 14. R. v. Oxon. 2 Salk. 429. R. v. Slatford, 5 Mod. 316. R. v. Ipswich, 2 Ld. Ray. 1240.

merely the power to amove again, and it is not a duty incumbent on them to do so, arising from the insufficiency of the officer to execute the office. As where an officer amoveable at pleasure has been amoved for an insufficient cause; for it is presumed that they acted under a misapprehension of their duty, and not through an intention of voluntarily dispossessing him of his office.

305. When the Court has given their opinion against a return, but are inclined to reconsider the matter, they award a peremptory mandamus *nisi*, which issues of course, unless they make known their opinion to the contrary before the expiration of the same term.

Peremp-
tory writ
nisi.

306. The peremptory writ is never denied after judgment for the plaintiff in an action for a false return brought in the Court of King's Bench, but it will not be awarded on a judgment obtained in the Common Pleas.

On judg-
ment of
false re-
turn.

307. "A peremptory writ of mandamus shall be granted without delay, for him or them for whom judgment shall be given, as might have been if such return had been judged insufficient."

On judg-
ment in
mandamus.

308. Judgment was given for the defendant in proceedings on mandamus in the Court of King's Bench; this was reversed in the Exchequer Chamber, and the reversal was affirmed in the House of Lords.—A peremptory mandamus was awarded to the prosecutor, because

On reversal
of judgment
for defend-
ant.

(305) R. v. Tappenden, 3 East, 192.

(306) Vide Part II. tit. 286. Buckly v. Palmer, 2 Salk. 431.

(307) 9 Anne, c. 20. s. 2.

(308) Bul. N.P. 202. Foot v. Prowse, 2 Str. 698. Sed vide R. v. Amery,

1 Anstr. 183. et Part II. tit. 286.

his right was established in the only manner it could be established on such proceedings, in as much as the province of the superior Court is only to affirm or reverse the judgment below, and not to give a new judgment for either party; and this is a mandatory and not a judicial writ, for which reason it is not necessary that there be a judgment to found it upon.

On postea. 309. No motion is allowed for a peremptory mandamus founded on an action for a false return until four days after the return of the postea, because the defendant has so long to move in arrest of judgment. But it may be awarded on the postea, without entering a formal judgment.

When stayed. 310. A motion for a new trial stays the issuing of a peremptory writ until the motion is disposed of.

311. But a bill of exceptions does not delay it, whether mentioned in time or not.

312. Nor does a writ of error brought on the judgment in an action for a false return; for were the peremptory writ restrained until the alleged error is decided, annual officers would afterwards derive no benefit from a judgment in their favor, as the office would expire in the interval.

Form of peremptory writ. 313. This writ must pursue the original mandamus in its direction, although that were erroneous and a

(309) *Bul. N. P.* 198. 200. *Buckly v. Palmer*, 2 *Salk.* 431.

(310) *Wright v. Sharpe*, 11 *Mod.* 175.

(311) *Wright v. Sharpe*, 11 *Mod.* 175. *Bul. N. P.* 200.

(312) *Wright v. Sharpe*, 11 *Mod.* 175. *Dublin v. Dowgate*, 1 *P. Wms.* 350. *Cont. Ruding v. Newel*, 2 *Str.* 983.

(313) *R. v. Ipswich*, 2 *Ld. Ray.* 1240.

misnomer, for the defendants have precluded themselves from objecting it, by their return to the substance; for this writ is merely to enforce the former, and founded upon it.

314. When the writ is directed to the mayor and Corporation, a personal service on all the members is not necessary, nor even upon the mayor. An attachment was granted for disobeying a peremptory writ, returnable in six days, which had been served personally on the town clerk alone; for if the defendants wanted further time, they ought to have applied to the Court for that purpose, and as to personal service it is unnecessary in other cases. Service of.

315. A peremptory writ to restore is fully obeyed, if the Corporation actually restore the officer, although they at the same time summon him to show cause why he shall not be amoved, and in pursuance thereof amove him for the same offence. In this case the restoration was on account of the irregularity of the amotion, and the insufficiency of the cause alleged; I apprehend that had the amotion been held regular, and the cause insufficient, a second amotion for precisely the same cause, would have been treated as a contempt of the Court. What sufficient obedience.

316. If the peremptory writ have been obeyed in mere form but not effectually, the prosecutor has an opportunity of bringing this before the Court, by opposing the motion to file the return. Objected to, when.

(314) R. v. Fowey, 5 D. R. 614.

(315) R. v. Ipswich, 2 Ld. Ray. 1283. Bagg's Ca. 11 Rep. 99. b.

(316) R. v. Ipswich, 2 Ld. Ray. 1283.

SECTION X.

ATTACHMENT.

When.

317. When the defendant is guilty of disobedience to the process of the Court, in not making a return in proper time ; they will assert their authority by issuing an attachment against him, under which they will punish the contempt, and compel obedience to the writ. When therefore a Corporation makes no return, the attachment must not issue against the Corporation, for that cannot commit an offence, but against the individuals who are guilty of the contempt in their natural capacity.

Against
whom.

318. If the writ issued to the two bailiffs, the attachment must go against both ; although one is willing to make the return, but is unable to do it because his colleague has the possession of the writ, and will neither join in a return, nor deliver the writ that he may make it by himself. The object of this is to prevent the prosecutor being defeated by the contrivance of the parties ; but when the officers are brought before the Court, the punishment will be proportioned to their respective offences.

319. So if the writ be directed to several in their natural capacities, unless all join in making a return, they must be all included in the attachment. But if it were directed to a Corporation, the attachment may

(317) *Mills' Ca.* T. Ray. 152.(318) *Bailiffs of Bridgnorth*, 2 Str. 808. *R. v. Salop*, B. N. P. 198. 201.(319) *New Sarum*, Comb. 327. *R. v. Salop*, B. N. P. 198. 201.

issue against those particular persons who are guilty of the offence, that is, those who do all in their power for the purpose of obeying it, are not to be included.

320. It is granted for not making the return to a For what. peremptory writ on the day assigned.

321. An attachment is granted for neglecting to make a return of the pluries, without allowing the defendant to be heard by counsel in explanation of the contempt.

322. It is granted after a peremptory rule to return the first writ, but not on a neglect to return the first writ on the day assigned.

323. And it is granted where a return is made, if it be frivolous and to avoid the justice of the Court, or if it be made contrary to the consent of the Corporation, where the writ is addressed to them as well as him who made the return; as if it were to the mayor, town clerk and burgesses, and on the return made by the mayor, the town clerk states by affidavit that he knows nothing of making it.

324. The manner of applying for an attachment is Rule nisi. by motion of the prosecutor's counsel, who upon showing by affidavits a fair ground for the interference of the Court, will obtain a rule nisi, upon which the defendant has an opportunity of showing any thing which

(320) *R. v. Fowey*, 5 D. R. 614.

(321) *Coventry Ca.* 2 Salk. 429. *Anon.* 2 Salk. 434.

(322) *Coventry Ca.* 2 Salk. 429. *Anon.* 2 Salk. 434. *Anon. Comb.* 234.

(323) *R. v. Robinson*, 8 Mod. 336. *R. v. Hoskins*, C. T. H. 188. *R. v. Abingdon*, 12 Mod. 308. *Vid. Part II.* 176, 7.

(324) *Chaunt v. Smart*, 1 B. P. 477. *Tidd's Pr.* 484.

will exculpate him from the charge, unless the contempt be very gross, in which case it is made absolute at first.

Service of writ.

325. It is not necessary to show personal service of a peremptory writ to a Corporation upon all the individuals of it or even upon the mayor, personal service on their town clerk is sufficient. And it seems that an attachment will be granted against a mayor, when the peremptory writ directed to him alone has not been served upon him, on affidavits that the writ had been left at his house, he having kept out of the way to avoid it.

326. The writ was directed to a Corporation under the statute of George, commanding the mayor and Corporation to elect a mayor on a day certain; there was a rule made by the Court that public notice in writing of the time appointed by the writ should be affixed in some public place by the town clerk six days before the election—a sufficient number of corporators did not attend—there were affidavits showing that the notice had been affixed to the Guildhall according to the directions of the rule, and that a copy of the rule had been served on the defendants and the greater number of the corporators: it did not appear that they had been served with the mandamus or that they had any other notice of it.—An attachment was granted: for if the defendants did not live within the municipality, or if they knew nothing of the matter, they ought to show it.

327. The affidavits upon which this motion is made, must assert positively that the persons upon whom

(325) *R. v. Fowey*, 5 D. R. 614. *R. v. Tooley*, 12 Mod. 312.

(326) *R. v. Edyvean*, 3 T. R. 352.

(327) *R. v. Newcastle*, 1 Barnard. 385.

the rule to return the writ was served, are the members of the Corporation to which the writ issued. It is insufficient to state that certain persons (naming them) were served with the rule, whose names are the same as those of the corporators; and if a rule have been obtained upon so defective an affidavit, it will be discharged, although the defendants have not shown cause, since an indictment for perjury could not be sustained upon it. Semb.

328. When a mandamus is served upon all the persons to whom it is directed, and an attachment is desired against all of them, it is enough to produce an affidavit of service of the writ, at the time for showing cause upon the attachment, nor is it then necessary to be produced, unless required by the other side. But if the writ were served only upon some of the members, and the attachment desired against them in particular, they ought to have an opportunity of answering this affidavit of the special service of the writ.

329. The writ was directed to the mayor and jurats, and no return made, because the mayor would have returned an execution of the writ, as he claimed the exclusive appointment to the office, and the jurats would have returned not elected, as they claimed an equal right to vote with the mayor. The Court withheld an attachment, and the parties entered into a rule by consent to try their right in a feigned issue, whether the prosecutor were or were not elected, &c. Feigned
issue.

(328) R. v. Esham, 2 Barnard. 265.

(329) R. v. Rye, 2 Bur. 796.

Attach-
ment.

330. Attachment is of two sorts ; that which may go upon the alias to punish the contempt of Court, and that which goes only on the pluries, which entitles the party to his action for damages.

(330) Anon. 12 Mod. 164. Ib. 348.

CHAPTER III.

QUO WARRANTO,

AND

INFORMATION IN THE NATURE OF QUO
WARRANTO.

SECTION I.

QUO WARRANTO.

331. The ancient method of proceeding against those who exercised franchises in derogation of the rights of the Crown, from which all public franchises emanated, was by an original writ called Quo Warranto, which was the king's writ of right, and issued whenever his attorney thought it expedient. Under some early statutes a general proclamation was to be made to command all those who enjoyed franchises, to come before the justices in eyre, and show their title, under pain of forfeiture, if they neglected to do so in the next eyre, unless they should come before the king in his Bench or other his justices. These proclamations were temporary, and the writ has grown obsolete; but on it is founded the information in the nature of quo warranto at common law, filed by the king's attorney general of his own authority, or by the king's coroner, formerly of his own authority, but since the statute of William under sanction of the Court of King's Bench.

(331) 6 Ed. I. 18 Ed. I. stats. 2, 3. Strata Marcella, 9 Co. 28. R. v. Trinity House, 1 Sid. 86. R. v. Trelawny, 3 Bur. 1616.

SECTION II.

INFORMATION IN THE NATURE OF
QUO WARRANTO.

332. This information is for the usurpation of franchises of three kinds. First, for the usurpation of franchises which the king has already granted, and are of such a nature, that if the defendant have no title, they may be repossessed and enjoyed by the king; such as the franchise of wrecks, waifs and estrays. Secondly, those which the king has created, and which subsist in themselves, although there be no person in esse, who has a good title to them; their nature is such that if the defendant be found to have no title, he must be ousted and forejudged of the enjoyment of them, but they are not repossessed by the king; of this kind are corporate offices, so that if the officer or all the officers be ousted, the franchise is not affected, but others may be appointed to fill their places either by election by other persons, to whom the king has granted the power, or, if there are none capable of making such election, by a new appointment of the Crown. The third kind comprises what are called franchises, but are not really such; that is, if one or more pretend to be a Corporation, or to have wreck or waifs and estrays, or a market, when in fact no such Corporation was ever erected, or grant made by the king of the franchise of wreck, waifs and estrays or a market, upon judgment against the defendant on this point, the pretended franchise is extinguished, and can neither exist in the crown nor be granted to others; therefore there can be no judgment of seizure of these, but the defendant must be forejudged and fined for his usurpation to the public injury.

Perhaps at the present day a criminal information would be preferred in the last case.

333. The information itself is also of three descriptions. The first is an information filed by the attorney general of his own authority ; the second an information filed by the master of the crown office by the direction of the Court, in exercise of its jurisdiction at common law ; the third a similar information by leave of the Court, in pursuance of the statute of the reign of Queen Anne.

334. The nature of the franchise usurped affects the judgment more than the other proceedings, and will be more fully discussed under that title. The character of the information will be considered in the three subsequent sections.

SECTION III.

INFORMATION BY THE ATTORNEY GENERAL.

335. The attorney general may of his own authority ^{Against whom.} file an information in the nature of a quo warranto in the Court of King's Bench, against persons who assume to act as a Corporation to compel them to show by what prescription statute or charter they make title to the franchise : or he may file it against an individual who possesses a corporate office or any other franchise to compel him to show his right. It is not often that resort has been had to this proceeding since the statute of Queen Anne.

Legal Corporation, for usurping a franchise.

336. He may file an information against a Corporation by the name of the body politic, for usurping a franchise to show by what title the Corporation holds such franchise.

Legal officer.

337. And he may file it against a person who is admitted to be a legal corporate officer, to show by what title he holds a franchise which he assumes to exercise in his official capacity ; as if the mayor assume a right to admit freemen without the assent of the rest of the body corporate.

One pretending to be an officer.

338. Or against a person who does an act to the public injury, under pretence of title as being the officer of a dissolved (suspended) Corporation. But the more proper proceeding is a criminal information.

SECTION IV.

INFORMATION AT COMMON LAW.

339. Besides the cases in which the statute of Anne has empowered the Court to grant leave to a private person to file an information in the nature of quo warranto, it has power at common law to direct such an information to be filed by the master of the Crown-office, on application by any subject, who shows that a public injury is done by the usurpation of franchises. This information is of a criminal character, and on a verdict

(336) *R. v. Cusack*, 2 Rol. 115.

(337) *R. v. Hertford*, 1 Salk. 374. S. C. 1 Ld. Ray. 426.

(338) *R. v. Saunders*, 3 East, 119.

(339) *R. v. Trelawny*, 3 Bur. 1616. *R. v. Williams*, 1 Bur. 407. *R. v. Saunders*, 3 East, 119. *R. v. Bedford Level*, 6 East, 367.

against the defendant, the Court will impose a fine for the offence, which is a misdemeanor, and, where the franchise has existence, give either judgment of ouster against the defendant, or of seizure into the king's hands, as the nature of the case may require. But the Court will not sanction this proceeding, either when the franchise is not of a public character, or when the applicant appears to them in the light of one intermeddling unnecessarily with the affairs of others; in these cases they will leave him to inform the attorney general, who will use his own discretion as to filing the information. Indeed where there is no such franchise as that which the person assumes to exercise, as if the applicant allege that a Corporation is extinct, and yet ask for an information against a person for acting as returning officer of members of parliament, under pretence of being an officer of such Corporation, the Court will not grant a quo warranto; for if the public have been injured by such act, the attorney general should file a criminal information.

340. The Court will not grant leave to file an information in the nature of a quo warranto against a Corporation, to show by what authority they act as a Corporation.

Not against Corporation.

341. Nor against persons, having a right to vote for members of parliament as inhabitants, for acting as burgesses by so voting, *as burgesses*, without having been admitted.

For equivocal act.

342. Leave has been granted to file an information in quo warranto against one wrongfully and unjustly

For hold-a court of record.

(340) R. v. Carmarthen, 1 W. B. 187. S. C. 2 Bur. 869.

(341) R. v. Harvey, 1 Str. 547.

(342) R. v. Williams, 1 Bur. 407. S. C. 2 Kenyon, 75.

holding and presiding at a court of record in the absence of the bailiffs of a Corporation, who are the legal presiding officers; though no usurpation of the office of bailiff was alleged; for although the case is not on that account within the statute of Anne, and there cannot be judgment of ouster, the introduction of a relator, is surplusage, and there may be a fine imposed for the offence.

Acting as
steward of
a court-
leet.

343. Against one claiming to be and acting as steward or bailiff of a court leet, whose office it is to summon and select the jury, or against one for holding a court leet; for this is a public court, and an office of a public nature. But not so the office of a steward of a court baron, for a court baron is not a public court, but the private court of the lord.

Bailiff, &c.
of a town.

344. Against one usurping the office of bailiff of an unincorporated town, "an office of great trust in its rule and government, and affecting the administration of justice therein," although there be of right no such officer belonging to the place, so that it is unnecessary to set forth particularly the constitution under which such office exists.

345. Against a bailiff, portreeve or sub-bailiff of an unincorporated borough being the returning officer, or "an office of trust and pre-eminence touching the election and return of members of parliament," although not expressly asserted to be the returning officer.—

(343) Clifton's Ca. 3 Leon. ca. 235. R. v. Medicot, 2 Barnard. 222. R. v. Hulston, 1 Str. 621. R. v. Bingham, 2 East, 312.

(344) R. v. Boyles, 2 Ld. Ray. 1560. S. C. 2 Str. 836. S. C. Fitzg. 82.

(345) R. v. M'Kay, 4 B. C. 356. R. v. Highmore, 5 B. A. 771. S. C. 1 D. R. 442. R. v. Mein, 3 T. R. 598, 599. n.

And even against one who voted for members of parliament claiming a right by virtue of a burgage tenement.

346. Against the governor of the Bedford Level, for his is an office of much public importance, though not strictly of a public character. Important office.

347. Against a chief constable of a hundred, though not a returning officer; but not against a petty constable. Public officer.

348. After several motions and debates at the bar, leave was given to file an information in the nature of quo warranto against the mayor and aldermen, in the name of the king's coroner, to show by what warrant they admitted persons not residing within the municipality to the freedom. And Holt C.J. said that they might be ousted and fined, although the franchise could not be seized into the king's hands. For admitting to freedom.

349. It has been granted against the bailiff and twenty-two of the common-council-men, for claiming, using and occupying without the mayor, and not being twenty-five of the common-council-men, the franchise to elect, approve and admit persons to be burgesses.

350. And against an individual for claiming to make and swear in free burgesses, without the concurrence of

(346) R. v. Duke of Bedford, 1 Barnard. 282.

(347) R. v. Ragsden, Cunningh. 54. Anon. 1 Barnard. 279.

(348) R. v. Hertford, 1 Ld. Ray. 426. S. C. 1 Salk. 374. Bul. N. P. 208. See vide S. C. in R. v. Breton, 4 Bur. 2261.

(349) R. v. Breton, 4 Bur. 2261.

(350) Id. ibid.

the bailiffs and burgesses ; and against another individual for claiming to elect and amove free burgesses ad libitum ; the former writ was superseded quia erroneè emanavit, but in a subsequent case the Court complied with a similar application.

351. And against A. and B. the mayor and town clerk of C. to show by what authority they used the franchise of admitting persons to the freedom, who had not a previous title by birth, servitude or election.—In this case the information is stated at length.

SECTION V.

INFORMATION UNDER THE STATUTE..

352. A new and more convenient method of proceeding on an information of this kind, applicable to almost all cases where Corporations are concerned, was introduced by the legislature in the reign of Queen Anne, and has been since brought to a considerable degree of perfection, and reduced to a form of action between the parties, essentially of a civil character, although in form and ancient reputation a criminal proceeding.

- I. 353. "If any person or persons shall usurp or intrude
- II. into, or unlawfully hold and execute—the offices of
- mayors, bailiffs, portreeves or other officers, or the fran-
- chises of burgesses or freemen—in any city, town cor-
- III. porate, borough or place within England or Wales—it
- IV.

(351) R v. Breton, 4 Bur. 2260.

(352) R. v. Shelley, 3 T. R. 142. R. v. Babb, 3 T. R. 579. R. v. Trannion, 2 Chit. Rep. 366. a.

(353) 9 Anne, c. 20. s. 4.

shall be lawful for the proper officer of the Court of Queen's Bench, the courts of sessions of counties palatine, and the Courts of grand sessions in Wales—with the leave of the said Courts respectively—to exhibit one or more information or informations in the nature of a quo warranto—at the relation of any person or persons desiring to sue or prosecute the same—and who shall be mentioned in such information or informations to be the relator or relators against such person or persons so usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises—and to proceed therein in such manner as is usual in cases of information in the nature of quo warranto.

v.
vi.
vii.
viii.

I propose, as the most convenient method of arranging the law on this subject, to offer a commentary on the different clauses of this enactment.

“If any person or persons shall usurp or intrude into or unlawfully hold and execute.”— I. User.

354. There must be a user and possession of the office or franchise; a mere claim to be admitted is insufficient, although founded upon an election which is not *primâ facie* void.

355. But an actual swearing in is a sufficient user, although it be imperfect or bad in law; as if made before an improper person, or before the corporate assembly after the president, an integral part of it, had left. But it was said by Page J. that a mere swearing

(354) *R. v. Ponsonby*, Say. 247. S. C. 1 *Kenyon*, 26. *R. v. Whitwell*, 5 T. R. 86.

(355) *R. v. Pursehouse*, 2 *Barnard*. 264. *R. v. Harwood*, 2 *East*, 180. *R. v. Tate*, 4 *East*, 340. *R. v. Buller*, 8 *East*, 392.

in before an officer de facto was not sufficient: this doctrine however I apprehend to be overruled.

356. Wrongfully and unjustly holding and presiding at a court of record of a borough, in the absence of the bailiffs, is not an usurpation of the office of bailiff, for the intruder may have thought it his right or duty in virtue of his own office as recorder or town clerk; yet it is an usurpation of the office of a judge, or of the franchise of holding the court, for which an information may be granted at common law.

357. Where a person has been recently chosen by persons having no color of authority to elect, although he have entered upon the office, it is unnecessary to oust him in quo warranto for the election is a nullity; and the proper electors may choose an officer into the place as being vacant. But if he have held undisturbed possession of the office and exercised it for a long while, he is to be regarded as an officer de facto, and an information may be granted.

358. A quo warranto was after some hesitation granted against a mayor for holding over his year,* and preventing the election of a successor; although he was not a returning officer within the act of Queen Anne, for it was said that there is no other remedy. But I apprehend that now a mandamus would be granted to

(356) *R. v. Williams*, 1 Bur. 407. S. C. 1 W. B. 95. S. C. 2 Kenyon, 75.

(357) *Anon.* 1 Barnard. 345.

(358) *R. v. Scott*, 1 Barnard. 24. 9 Anne, c. 20. s. 8.

* *Qu.* Is not this case erroneously stated — was not the former mayor re-elected, instead of holding over?

proceed to a new election, notwithstanding the right to hold over, and without a previous ouster.

359. It is not necessary that the person should be continuing to hold the office at the time of applying for the information. It will be granted where one has usurped an office which was in its nature temporary, as the office of mayor or annual alderman, although the year have expired and four years since elapsed, during which others have been successively elected; so it will be granted where the office is permanent, but the usurpation has ceased, as where one had held the office of alderman, and resigned it before the application, particularly if there be any doubt on the sufficiency of the resignation, for in this case there should be a disclaimer on the record. And when the office has determined, there may be judgment for the fine, although there can be no ouster. So it will be granted when one legally in office has resigned it though without deed, and afterwards usurped it and acted again.

“The offices of mayors, bailiffs, portreeves or other officers, or the franchises of burgesses or freemen.” II. What offices.

360. The operation of this statute is confined to corporate offices and franchises, and therefore under its provisions an information cannot be granted against a whole Corporation, as a Corporation, for usurping the franchise; it is added, although it may be granted against all the individuals who constitute the body politic.

(359) *R. v. Powell*, Say. 239. *R. v. Williams*, 1 W. B. 95. *R. v. New Radnor*, 2 Kenyon, 498. *R. v. Warlow*, 2 M. S. 76. *R. v. Paine*, 2 Chit. Rep. 367.

(360) *R. v. Carmarthen*, 2 Bur. 869. S. C. 1 W. B. 187. *R. v. Williams*, 1 W. B. 95. S. C. 1 Bur. 407

Neither is it granted under the statute for usurping the office of judge of a Corporation court, which office of right belongs to certain corporate officers.

361. Nor does the statute extend to a portreeve of a borough, although a returning officer of members of parliament; nor to a registrar of a city court of requests, elected by the householders; nor to a usurper of the franchise to have a fair or market; although these offices and franchises should exist in a corporate place; for they are not corporate offices or franchises.

III. What place.

“In any city, town corporate, borough or place within England or Wales.”

362. The Corporation must be in a state of activity, for an information will not be granted against one acting as returning officer of members of parliament, under pretence of exercising his franchise as alderman of a Corporation averred to be dissolved.

363. The words “borough or place,” are by the general construction to be put on the act, restricted to boroughs and places incorporated; and therefore the steward of a court leet, the bailiff, sub-bailiff or constable of an unincorporated borough is not within its provisions, although he may be the returning officer of members of parliament.

(361) *R. v. Richardson*, 9 East, 470. *R. v. Hall*, 2 D. R. 342. S. C. 1 B. C. 237. *R. v. Marsden*, 3 Bur. 1812. S. C. 1 W. B. 579.

(362) *R. v. Saunders*, 3 East, 119.

(363) *R. v. Mein*, 3 T. R. 598. *R. v. Wallis*, 5 T. R. 379. *R. v. Richardson*, 9 East, 470. *R. v. M'Kay*, 4 B. C. 356.

"It shall be lawful for the proper officer of the Court of Queen's Bench, the courts of sessions of counties palatine, and the courts of grand sessions in Wales." IV. What courts.

364. The information can be filed only in and by leave of these Courts, and so it was at common law: the information was allowed by virtue of the general jurisdiction of the King's Bench, as the grand justiciary of the kingdom, and having the superintendence of magistrates and public officers in the administration of justice. It was held that proceedings and a judgment in the court of exchequer (in Ireland) were upon this ground absolutely null and void, as being coram non judice, although a new charter had been granted upon it and acted upon for many years.— In the King's Bench the master of the crown-office (the king's coroner) is the proper officer.

"With leave of the said courts respectively."

V. By leave.

365. This leave is obtained by motion made in the Court of King's Bench by counsel in term time; and it seems that such motion cannot be made on the last day of term, for it was thought that the rule as to criminal informations, in this respect applied to informations in the nature of quo warranto. It cannot be signed by counsel before leave is obtained, and therefore the information need not state that it is filed by leave of the Court. Motion for.

366. A quo warranto against a person in the office, may be applied for at the same time as a mandamus to restore one who has been removed from it.

(364) *Pippard v. Drogheda*, 5 Bro. P. C. 369.

(365) *R. v. Davies*, Say. 241.

(366) *Vid. Part II. tit. 102.*

367. This motion must be founded on affidavits, stating all the circumstances upon which the defendant's title is impeached. The statement must be of facts and not legal deductions, and they must be so positively and formally alleged, that an indictment for perjury, may be sustained upon it if wilfully false.

368. The following averment was held sufficiently positive, not being denied by the defendant: "This deponent understands and believes that at a certain meeting the defendant, as he has heard and believes, was admitted a freeman, and that he has been since sworn and enrolled accordingly, as he hath been informed and believes."

369. The following allegation was held insufficient for stating a legal deduction, instead of the facts which were to warrant that deduction, "the defendant at the time of his election did not *reside* in the borough *as was required* by the charter," for this by a technical interpretation, implied that he did reside in the borough, but that the nature of his residence was not that which the charter required, and therefore it ought to have been shown what kind of residence the charter rendered requisite, and in what that of the defendant was insufficient. In a less precise construction, the first clause of the sentence is positive, that the defendant did not reside in the borough, and the signification of the second is, that residence in the borough is required by the charter.

(367) R. v. Sargeant, 5 T.R. 469. Sed vide R. v. Harwood, 2 East, 180. Vide Part II. tit. 36.

(368) R. v. Harwood, 2 East, 180.

(369) R. v. Sargeant, 5 T. R. 469.

370. Affidavits made on a motion for an information against A. cannot be read on a similar motion against B. because it is said the deponent cannot be prosecuted for it if false.

371. The prosecutor *may* use the affidavits of a person whom the Court would not allow to become relator on the information. Semb.

372. If a town clerk have made an entry in the Corporation books, that he had administered the oaths to the defendant, it seems that on a recent application his affidavit that he had not administered them, with an explanation of the entry, may be read; but it will be rejected on an application made after the lapse of several years.

373. If the affidavits of the prosecutor, assert that the defendant resided at a place, which is not within the borough, he must also aver that he did not reside within the borough. For a person may have two places of residence at the same time, and live sufficiently often at each to be considered by the law a resident householder, in the one as well as the other. Non-residence.

374. If the affidavits set forth facts from which a custom to elect in a particular manner is to be inferred by a jury, as that a particular manner of electing has prevailed for fifty years and upwards, and as far back Manner of election.

(370) R. v. Thetford, 11 Mod. 141. Tidd's Prac. 496. et pass.

(371) R. v. Binstead, Cowp. 77. R. v. Symmons, 4 T. R. 224. Sed Vide Part II. tit. 422.

(372) R. v. Helstone, 2 Str. 677.

(373) R. v. Scelden, 2 Barnard. 439.

(374) R. v. Lane, 5 B. A. 488.

as the deponents could recollect, they must add that they believe that manner of electing to be immemorial ; for although the facts stated be true, and there are none other who can show an anterior usage to the contrary, yet such a usage may be in the knowledge of those who make the affidavits.

Acceptance
of charter.

375. If they set forth a charter they must either positively aver that it has been accepted, or show such a usage to have subsequently prevailed within the municipality in conformity with it, as cannot be supposed to have taken place, had not that charter become the governing constitution, from whence the Court may necessarily infer its acceptance.

Rule nisi.

376. When the applicant has made out a prima facie case of usurpation upon a corporate franchise, the Court grants a rule nisi upon the defendant, the object of which is to afford him an opportunity of discovering to the Court the evasiveness or insufficiency of the charge against him, or any legal reason why the information should not be granted, and not of positively denying it by his affidavits. Yet it seems that if the affidavits for the defendant so positively deny the facts asserted on the other side, as to sustain an indictment for perjury, the information in the nature of quo warranto will be refused until an indictment has been prosecuted, and the persons making such affidavits have been found guilty.

Affidavits
for defend-
ant.

377. Whether facts are asserted or denied by the defendant, he should always be prepared with the affidavits

(375) R. v. Barzey, 4 M. S. 255.

(376) Bul. N. P. 206. R. v. Woodman, 1 Barnard, 101. R. v. Trew, 2 Barnard. 371.

(377) R. v. Trew, 2 Barnard, 371.

of others as well as his own, for his alone will not be much respected where the facts are of such a character that they would of course be known to others.

378. The Court does not of course give leave to file this information, but will form their opinion as to the expediency of allowing it, on consideration of all the circumstances which are developed by the affidavits of both parties, so that an omission of any material fact in those on the one side, may be supplied by the admissions of the other, although it make against the party by whom it is admitted. But nothing will be presumed which would tend to avoid an election which has been many years acquiesced in.

Court's discretion in allowing information.

379. When a *prima facie* case of usurpation is shown, and there appears a fair doubt on the title of the defendant, the Court will not discuss the question in the summary way of motion, but send the facts to a jury. Yet if there be any personal objection to the applicant, as that he labours under the same defect of title, or has acquiesced in the title which he now disputes, the Court will refuse the information. And it will not be granted without a very strong case, where the applicant is a stranger unnecessarily intermeddling in the affairs of the municipality, or where the judgment against the defendant will involve the dissolution of the Corporation.

When granted.

(378) *R. v. Stacey*, 1 T. R. 2. *R. v. Mein*, 3 T. R. 597. *R. v. Hill*, Loft. 43.

(379) Vide Part II. tit. 412. et seq. Bul. N. P. 206. *R. v. Stacey*, 1 T. R. 2, 3. *R. v. Bond*, 2 T. R. 771. *R. v. Mein*, 3 T. R. 598. *R. v. Clarke*, 1 East, 46. n. 47. *R. v. Trevenen*, 2 B. A. 482.

380. When the Court will not allow the information on the original ground of the application, they will not permit the prosecutor to abandon that, and to resort to some other point, which was not brought principally forward, and relied upon at first, for the trial of a mere incidental and secondary question.

In the following cases the Court has thought proper to send the question to a jury, or leave the parties to bring it more solemnly before themselves on demurrer ; and therefore allowed an information.

Eligibility
doubtful.

381. When there was a doubt whether the defendant was previously qualified to be elected, as where it was doubtful whether he had sufficient capacity at common law ; in this case he possessed the office of burgess, having been elected when an infant nine years old, and admitted when he attained his full age.

382. The defendant was a non-resident at the time of his election, but afterwards came to reside ; the question was whether the terms of the charter required residence as a *previous* qualification for the office of capital burgesses, the words being, that no capital burgess should exercise his office any longer than he was an inhabitant.

383. Residence was a necessary qualification, the question was whether the defendant were qualified, that

(380) R. v. Osbourne, 4 East, 336.

(381) R. v. White, C.T.H. 8. R. v. Carter, Cowp. 59. 226. R. v. Courtney, 9 East, 261. Claridge v. Evelyn, 5 B. A. 86.

(382) R. v. Pool, 2 Barnard. 93. Vid. Part I. tit. 481.

(383) R. v. Lathrop, 1 W. B. 471. S. C. R. v. Latham, 3 Bur. 1487. R. v. Richmond, 6 T. R. 561.

is, whether an occasional short stay at lodgings rented by the year, were a bona fide residence or merely a colorable qualification for the particular purpose of the election.

384. There were two doubts,—whether being a capital burgess was required by the charter as a previous qualification for being elected mayor; and whether the defendant had been legally elected into the office of capital burgess, it being admitted that he was a burgess, which he contended to be the only qualification required by the charter.

385. A. and B. (the defendant) were nominees, notice had been given that A. was ineligible; afterwards a majority voted for A. but B. was admitted. The doubt was whether A. were actually ineligible under the act of Anne; for if it be found that he was qualified, B. must be ousted, and A. admitted in his stead.

386. The defendant had neglected to receive the sacrament within the year before his election; but he affirmed in his affidavits that he was of the established church of England, and had not anticipated that he should be elected, having been absent from the municipality.

387. The right of election was vested in the jury of a borough court (not the leet) of a prescriptive borough, and the defendant was elected by a jury, the doubt was whether the jurors were qualified; there was

Election doubtful.

(384) *R. v. Tucker*, 1 Barnard. 27.

(385) 9 Ann. c. 20. s. 8. *R. v. Godwin*, Doug. 385.

(386) *R. v. Smith*, and *R. v. Brown*, 3 T. R. 574. et n.

(387) *R. v. Whitchurch*, 8 Mod. 210.

a question whether they must be *inhabitants* having a freehold in the municipality, or whether *non-residents* having such a freehold were qualified. The reason of granting the information was, that there could be no information against the jurors themselves, and the title of the electors was such that it could not be tried except by proceedings against the person elected by them.

388. The notice to the corporate assembly was defective in omitting to state that the purpose of meeting was an election ; but there were other doubts in the case.

389. The common council consisted of the mayor, aldermen, recorder, chamberlain and capital burgesses ; the charter directed that the election of the recorder should be by the mayor, aldermen and capital burgesses without the chamberlain, who should not be present.— Notice of an assembly of the common council was given, a majority convened, among them the chamberlain, who was also an aldermen — defendant was elected recorder. The two questions were as to the notice on which the assembly convened, and whether the chamberlain could be present in his capacity of an alderman.

390. The defendant was elected at the adjourned court.—The affidavits for the prosecutor asserted, that according to their apprehension and belief the bailiffs, though not mentioned in the style of the Court, were an essential part of it, and that one must be present : this the affidavits on the other side denied, according

(388) *R. v. Tucker*, 1 Barnard. 27. V. Part I. tit. 74. II. 384.

(389) *R. v. Sandys*, 2 Barnard. 301, 2.

(390) *R. v. Lathrop*, 1 W. B. 470, S. C. *R. v. Latham*, 3 Bur. 1485.

to their apprehension and belief. A Court was held at which *no* bailiff was present ; they *adjourned* to another day, when the election took place. It was therefore doubtful whether the bailiff were an integral part of the corporate assembly, and if the first meeting were insufficient the second was a nullity, though sufficiently constituted, being a mere adjournment.

391. The question was, whether the bailiff, who had by the custom a right to hold over until another was duly appointed, could be put out by a new appointment, after a defective appointment made at the proper time.—
Note : this case is very badly stated ; the title of the mayor appears to have been defective.

392. The electors of the defendant had been disfranchised, and on a mandamus restored by the mayor alone, contrary to the consent of the body (as was said), so that their right to vote appeared to be doubtful.—If the electors were in possession of their office, their titles could not be thus investigated : but there ought to have been informations against them individually.

393. There was a doubt on the words of the charter, who were the persons who ought to admit, and therefore whether the defendant's admission were sufficient. Admission doubtful.

394. From the facts stated, there was a doubt whether the office of the defendant, from which it was sought to oust him, were not incompatible with another which he had subsequently accepted. Incompatible office doubtful.

(391) R. v. Butler, 8 Mod. 350.

(392) R. v. Latham, 3 Bur. 1485.

(393) R. v. Trew, 2 Barnard. 371.

(394) R. v. Pateman, 2 T. R. 779. ;

When doubtful whether information lies.

395. Where there is a fair doubt whether the information ought to be allowed, and the plaintiff would be without other remedy, leave will be granted to file it, that the question may be brought more solemnly before them than upon motion, and that the parties may have an opportunity of carrying it before a superior tribunal. And the circumstance of the question being new, of great consequence, and affecting almost all the Corporations in the kingdom, will be rather an inducement to allow than to refuse the information.

In the following cases the Court has refused leave to file an information in the nature of quo warranto.

Original title sufficient.

396. Where the original title of the officer is not impeached, and he has not been removed from office, although the affidavits show a good cause of removal. And it will even be refused where the officer is non-resident, and the charter declares that by no longer residing, he shall *vacate* his office. For it is not determined until removal, and whenever the original title is sufficient, there is no ground for this proceeding.

Title under void charter.

397. The defendant (as mayor) claimed under a charter which had been acted upon ever since it was granted (thirty-five years) without interruption, but which was averred to have been granted in consequence of the surrender of a former charter, which surrender had never been enrolled. The Court said they would leave this matter to the attorney-general, because the title of

(395) *R. v. Scott*, 1 Barnard. 24. *R. v. Carter*, Loft. 519.

(396) *Lord Bruce's Ca.* 2 Str. 819. *R. v. Ponsonby*, Say. 248. *S. C.* 1 Kenyon, 26. *S. C.* 5 Bro. P. C. 299. *R. v. Heaven*, 2 T. R. 776. *Vid.* Part II. tit. 93.

(397) *R. v. Morgan*, 11 Mod. 309.

the whole Corporation was involved. This case is, I apprehend, overruled by that of the city of Chester, which was an information against an alderman, making title under another of the void charters of king Charles, though in that case there was no sufficient evidence of usage.

398. It was requisite that both nominees should be aldermen, and at the defendant's election the other nominee held the offices of alderman and recorder, (the latter being last accepted,) at that time usually held together, but seemingly incompatible, the election was five or six years before the application; and the information refused.

Nomina-
tion doubt-
ful.

"To exhibit one or more information or informations in the nature of a quo warranto."

VI. Several
informa-
tions.

399. Two or more informations may be granted at the same time against the same person to try his title to two distinct offices in the same Corporation, as if he be mayor and common-council-man.—Or distinct offices used and claimed by the same person, may be tried in the same information.

400. Or two informations may be granted at the same time; one against an elector, and another against a person, the validity of whose election depends on the legality of such elector's office or place; or against the person who presided at a corporate assembly, and another person elected at the same assembly. But in

(398) R. v. Trevenen, 2 B. A. 482.

(399) R. v. Ponsonby, Say. 249. R. v. Stokes, 2 M. S. 71. Symmers v. Regem, Cowp. 500.

(400) Anon. 2 Barnard. 193. Anon. 2 Barnard. 220. R. v. Penryn, 8 Mod. 216.

these cases the Court will on motion enlarge the rule, against the person *elected*, and direct that against the elector or president to be tried first.

VII. Who
may be re-
lator.

“At the relation of any person or persons desiring to sue or prosecute the same.”

401. Under the power which is vested in the Court of granting or refusing leave to file the information, they will consult the ends of justice in rejecting the application, although it is evident that the defendant has no right, if it appear that the public is not injured, and there is an impropriety in the conduct of the person who comes forward to propose himself as the relator.

In the following cases the Court have considered it proper to sanction the application, although it had been suggested that there was a personal objection to the applicant when he was,

Stranger.

402. A person having no interest in the affairs of the Corporation, when there was a strong case against the defendant, such as his having omitted to receive the sacrament.

Inhabitant.

403. An inhabitant of the borough, though not a freeman, the municipal government being vested in the Corporation.

One previ-
ously elect-
ed subse-
quently ad-
mitted.

404. One who, having been previously elected into the Corporation, was admitted during the mayoralty of

(402) R. v. Brown, 3 T. R. 574. n.

(403) R. v. Hodge, 2 B. A. 344. n.

(404) R. v. Trevenen, 2 B. A. 342.

the defendant, for usurping which office the information is moved; for such admission is matter of right and no acquiescence in the defendant's title, and moreover such an applicant has a particular interest in ousting the usurper, that his inchoate right may be perfected by a legal admission.

405. A corporator so poor as not to be responsible for the costs if there should be a verdict for the defendant.

Corporator poor.

406. A corporator who voted for the defendant at his election into the office from which he seeks to oust him, he being at the time ignorant, that the defendant was disqualified by having neglected to receive the sacrament.

When disqualification latent.

407. A corporator who was present and voted at the time of the defendant's election (it seems against him), and who has since attended corporate meetings at which the defendant presided, although a judgment against him will suspend the Corporation.

Who has acquiesced in defendant's acts.

408. A corporator who applies to oust the defendant from the office of mayor, having objected to his qualification at the time of his election to the office of alderman, on the validity of which election, the superior office depends, although he had since attended corporate meetings with him, and did not object to his election to the mayoralty.

(405) R. v. Trevenen, 2 B. A. 343.

(406) R. v. Smith, 3 T. R. 574.

(407) R. v. Morris and Stewart, 3 East, 216.

(408) R. v. Clarke, 1 East, 46.

Who has long known the disqualification.

409. A town clerk who had been long acquainted with the defect in the defendant's title, it not appearing that he had lain by intentionally, or been guilty of any improper conduct in the affair.

Who is in concert with the defendant.

410. One who applies as a friend of the defendant, to institute the proceeding for the purpose of empowering him to enter a disclaimer, where it is doubtful whether he hold incompatible offices, and there is no way of resigning one of them. But the Court will impose such restriction on the parties as the interests of third persons render necessary.

Who may not.

In the following cases the Court refused leave, on the ground of personal objection to the applicant when he was,

One who advised the defendant.

411. A person who, having been the legal adviser of the defendant, had frequently since advised him during the exercise of the office that his election was good.

A meddling stranger.

412. A stranger to the Corporation, having no proper interest in their affairs, in a case where public expediency did not require the application, and the circumstances did not show a very strong case.

Corporator tool of others.

413. A corporator whether rich or poor who appeared to be the mere tool of a stranger or other person on whose application the Court would have refused the information; and when there was good ground to sus-

(409) *R. v. Binsted*, Cowp. 77.

(410) *R. v. Marshall*, 2 Chit. Rep. 370.

(411) *R. v. Paine*, 2 Chit. Rep. 369.

(412) *R. v. Grant*, 11 Mod. 299. *R. v. Stacey*, 1 T. R. 3.

(413) *R. v. Stacey*, 1 T. R. 4. *R. v. Cudlipp*, 6 T. R. 503. *R. v. Trevenen*, 2 B. A. 344. 482.

pect this collusion from the affidavits of the different parties, the Court required explanatory affidavits, and the disavowal of all parties who appeared to be implicated.

414. A corporator whose own title is subject to the same defect as that of the defendant which he seeks to impeach, as if at his own election he received the vote of a person, who has been since ousted, and he comes to dispute, the defendant's title as depending upon the legality of that person's vote. Holding by similar title.

415. A corporator who was elected under a president whose title is subject to the same defect as that of the defendant.

416. A corporator who has concurred in the very act of which he comes to complain, or who has acquiesced in the title of the defendant. Who has concurred.

417. A corporator who has long acquiesced in two offices subsisting in the same person, on the incompatibility of which the defendant's title rests, particularly if such offices were at the time generally esteemed compatible; as if the election was to be of one of two nominees, both of whom must have been aldermen, and when the defendant was elected, his co-nominee possessed the offices of alderman and recorder, his subsequent election to that of recorder having in law vacated the former office.

(414) *R. v. Bond*, 2 T. R. 771. *R. v. Peacock*, 4 T. R. 687. *R. v. Cudlipp*, 6 T. R. 503.

(415) *R. v. Cudlipp*, 6 T. R. 508.

(416) *R. v. Stacey*, 1 T. R. 2. *R. v. Clarke*, 1 East, 46.

(417) *R. v. Trevenen*, 2 B. A. 343. 482.

418. A corporator who has concurred in an agreement not to enforce a by-law, under which he now seeks to impugn the defendant's title.

Who has
improperly
lain by.

419. A corporator who has known the defect for several years, and lain by until the judgment against the defendant will have the effect of dissolving the Corporation, if it appear that he did so intentionally.

Who im-
pugns his
own act or
entry.

420. A town clerk who seeks to impeach the title of the defendant on the ground of not having taken the oaths to the government, which he was the proper officer to have administered, if he neglected to tender them; although the officer did not offer to be sworn. There was an affidavit by the defendant that he would willingly have taken them had he known it to be necessary. The town clerk had lain by a long while, and now came forward on the instigation of a stranger, for the purpose of encreasing his influence in the borough election.

Who has
obtained the
information
by fraud.

421. A person who founds his application upon a confession of a defect of title, which he had insidiously obtained from the defendant.

Some ad-
missible,
others re-
jected.

422. If several persons apply for the information of whom some are not proper persons to be relators, and there is no personal objection to the others whose affidavits set forth the whole ground on which the defendant's title is impeached, the Court will grant it to those

(418) *R. v. Mortlock*, 3 T. R. 301.

(419) *R. v. Bond*, 2 T. R. 771. *R. v. Trevenen*, 2 B. A. 482.

(420) *R. v. Hart*, 8 Mod. 56.

(421) *R. v. Dicken*, 4 T. R. 283.

(422) *R. v. Symmons*, 4 T. R. 223. *R. v. Cudlipp*, 6 T. R. 509.

who are unexceptionable exclusively of the others ; unless it appear that they are acting under the influence and are the mere tools of those to whom it would have been denied.

423. If on showing cause the defendant rely on the circumstance of the applicant's being in the same situation with himself, or having acquiesced in his usurpation, he must set forth plainly and positively all the facts from which this will appear.

Objection to applicant shown.

" Who shall be mentioned in such information or informations to be the relator or relators against such person or persons so usurping, intruding into or unlawfully holding and executing any of the said offices."

VIII. Nominal relator.

424. Notwithstanding this provision, the practice is for the party who has obtained the rule to appoint whom he thinks fit to be relator, but it seems that if he who is appointed has no interest in the dispute, the proceedings will be stayed by the Court.

SEVERAL INFORMATIONS.

425. " If it shall appear to the said respective Courts, that the several rights of divers persons to the said offices and franchises may properly be determined on one information, it shall and may be lawful for the said respective Courts to give leave to exhibit one such information against several persons, in order to try their respective rights to such offices or franchises."

(423) R. v. Bond, 2 T. R. 771.

(424) R. v. Wynne, 2 M. S. 346.

(425) 9 Anne, c. 20. s. 4.

426. It has been said that where the situation of each defendant is precisely similar, and no inconvenience will follow, the right claimed and the evidence to be adduced against each being exactly the same, the Court will direct several informations to be consolidated. But as inconveniency may at all times arise from this, when the offices are distinct though of the same character, in depriving the defendants of an opportunity of severally disclaiming or maintaining their respective offices, the Court will seldom consolidate the informations, except in cases where the office is joint. But upon an undertaking of all the defendants to abide the event of one trial, where their titles are precisely similar, and disclaim if there be judgment of ouster against one of them, the Court will direct, for the purpose of avoiding expense, that one only of several informations shall be carried to trial, and that the rest shall be suspended.

427. Rules for quo warranto are often drawn up against the borough of such a place generally, without assigning the name of Corporation, and the body politic is sufficiently identified by the fact that there is such a place as the borough.

(426) *R. v. Foster and others*, 1 Bur. 573. *Symmers v. Regem, Cowp.* 500. *R. v. Warlow*, 2 M. S. 76. 1 Barnard. 282.

(427) *R. v. Bedford*, 1 Barnard. 242.

SECTION VI.

PROCEEDINGS ON THE INFORMATION.

I. BEFORE PLEA.

428. "To proceed therein in such manner as is usual in cases of information in the nature of quo warranto."

429. The Court will not quash the information upon motion, though with the consent of both parties, but will grant a consent rule to discharge the recognizances.

Recognizances discharged.

430. The process on the writ was summons, and on default of appearance a seizure of the franchise usurped. But on the information in the nature of quo warranto, the first process is venire facias, in nature of a summons, and then distringas, between the teste and return of which there must be fifteen days, if the Corporation be in a foreign county. But on the information against a Corporation, there can be no seizure for a default before the distringas.

Process — Seizure on non-appearance at the return.

431. In proceedings against a Corporation for usurpation of a franchise, if they be in default, there may be judgment of seizure of the franchise into the King's

Seizure on default.

(428) 9 Anne, c. 20. s. 4.

(429) R. v. Edgar, 4 Bur. 2297.

(430) R. v. Trinity House, 1 Sid. 86. Briggs' Ca. 2 Rol. 46. R. v. Wygorne, 2 Rol. 92. R. v. Hertford, 1 Ld. Ray. 426. 3 C. 1 Salk. 374. S. C. Carth. 503. R. v. Yarmouth, 3 Salk. 104.

(431) Strata Marcella, 9 Co. 29. 2 Chest. Ca. 567, 8. Co. Ent. 539. b.

hands or in the king's right quousque : but as the existence of the Corporation is not affected, it may come in and fine and reply, or the King may pardon the default by proclamation or charter, upon which the body are entitled to repossess themselves of their franchises ; indeed no act is necessary on their part, unless a writ of execution have issued to the sheriff, and he have made execution of the franchise, which the king may put into the keeping of a custos.

432. It has been said that on the writ, if the franchise were seized on default, and not replevied in the same eyre or term, the defendant could not afterwards replevy, but should be concluded for ever. And in imitation of this was the practice on the information in the reign of Charles the Second. If the party did not appear there was judgment of seizure quousque, and if they did not replevy and appear in the next term, there was judgment final unless they should plead within a certain day.

433. But this proceeding is not warranted in law, for on the writ if one made default on the summons and again on the venire facias, although there were two defaults, the judgment could only be of seizure into the king's hands and not of forejudger ; for it is no cause of forfeiture, as no man shall finally lose his land or franchise on any default unless he have appeared ; but process must be continued until the king may have final judgment.

(432) Maidstone Ca. Poph. 180. Judgment in Quo Warranto, Comb. 19. R. v. Chester, 2 Show. 366. Glo'ster, 2 Inst. 282.

(433) 3 Jenk. Cent. Ca. 91. Strata Marcella, 9 Co. 29. 2 Chest Ca. 566.

434. The Court might at common law either grant or deny a second imparlance in their discretion. Imparlance.

435. "The said courts respectively, may allow such person or persons respectively, against whom any information in the nature of a quo warranto in any of the cases aforesaid, shall be sued or prosecuted, or to the person or persons who shall sue or prosecute the same, such convenient time respectively to plead, reply, rejoin or demur as to the said courts respectively shall seem just and reasonable." Time to plead.

436. "Such person or persons against whom such information or informations in the nature of a quo warranto shall be sued or prosecuted, shall appear and plead as of the same term or sessions, in which the said information or informations shall be filed, unless the Court where such information shall be filed, shall give further time to such person or persons against whom such information shall be exhibited to plead."

437. After appearance two four-day rules are given for the defendant to plead, after the expiration of the last, the Court is moved for a peremptory rule, which is granted on the day of the motion or any day after: if the last rule of course do not expire, so that the motion for the peremptory rule may be made before the end of the term, the defendant has until the following term to plead. Rule.

438. After plea pleaded there must be given one rule

(434) *Herring v. Brown*, Comb. 12.

(435) 9 Anne, c. 20. s. 6.

(436) *Id.* s. 4.

(437) *R. v. Ginever*, 6 T. R. 595. et n.

(438) *Id.* *ibid.*

of course on the expiration of which, the Court may be moved for a peremptory rule.

Disclaimer. 439. The defendant may either disclaim the franchise mentioned altogether, or disclaim as to part of the time and justify as to other part. And under particular circumstances on making the rule absolute, the Court will direct that the defendant shall be allowed to enter a disclaimer without paying costs. In this case the defendant was a very young man, and had never acted in the office.

440. If the affidavit annexed to a plea in abatement, have no title, the plea must be set aside.

II. PLEA.

**No general
issue.**

441. The defendant must either disclaim or justify; he cannot plead non usurpavit; for if he admit his possession of office, he is bound to show his title specially, and all those particulars on which it is founded.

**Must rely
on his own
title.**

442. It is not sufficient to show a title in another to the franchise; for the object of this proceeding is not like an action in which the plaintiff seeks to recover, and must therefore rely on his own right; but it is for

(439) Co. Ent. 527. b. R. v. Biddle, 2 Str. 952. R. v. Holt, 2 Chit. Rep. 366. Tidd's Prac. 984.

(440) R. v. Jones, 2 Str. 1161.

(441) R. v. Blagden, 10 Mod. 299. R. v. Trinity House, 1 Sid. 86. Strata Marcella, 9 Co. 28.a. Gloucester (st.), 2 Inst. 281. Anon. 12 Mod. 225.

(442) 2 Chest. Ca. 548. Partridge's Ca. Cro. Eliz. 125. Musgrave v. Nevinson, 1 Str. 585. R. v. Leigh, 4 Bur. 2145. R. v. Hebden, Andr. 392.

the purpose of excluding the defendant from the possession of an office or franchise, from which the public have a right to demand his being ousted, unless he shows a complete legal title in himself. But any defect in the plea may be helped by treating facts alleged by way of inducement in the information, as though they were incorporated in the plea, for the purpose of sustaining the defendant's title.

443. The defendant may by leave of the Court plead several pleas, although he do not introduce as one of them, that he had held the office for six years. Double pleading.

444. But he cannot plead two inconsistent pleas, as to justify in one under the constitution by custom, and in the other under a constitution introduced by a charter. Inconsistent pleas.

445. The defendant may plead that he has held the office for six years before the information filed.—“ Which plea shall and may be pleaded either singly or together with and besides such plea as he or they might have lawfully pleaded before the passing of this act, or such several pleas as the Court on motion shall allow.” Six years.

This statute and that of Anne are made in *pari materia*, and confined to corporate offices in corporate places.

446. But if a corporator were more than six years ago elected to an incompatible office, and still holds both

(443) *R. v. Autridge*, 8 T. R. 468. *R. v. Newland*, Say. 96. *R. v. Powell*, 8 Mod. 180.

(444) *R. v. Powell*, 8 Mod. 180.

(445) 32 Geo. III. c. 58. s. 1. V. Part I. tit. 747. 9 Anne, c. 20. *R. v. Richardson*, 9 East, 470.

(446) *R. v. Lawrence*, 2 Chit. Rep. 371.

offices which are still incompatible, this plea does not apply.

Defendant's title.

447. For the purpose of making out his title, the defendant must show the constitution of the municipality by which the office or franchise exists, how a title to it is acquired, a vacancy (if an office in a definite body), his own title by election or inchoate right, and his admission according to the constitution he has set forth.

Constitution.

448. The plea must set forth the existing constitution, as supported by custom, statute (if not a public act), or charter, unless it be set forth in the information, and admitted by the defendant as there shown.

449. If the information describe the persons who were incorporated as the "mayor and citizens," and the plea describe them as "citizens and inhabitants," being a description of individual persons before incorporation, the Court will intend them the same, and not presume that there were two Corporations of the same name co-existent in the same place.

450. If the plea set forth a commission in the charter to swear the then appointed mayor, aldermen and common council, but omit to aver that the mayor, aldermen and common council were sworn, and afterwards aver an election by the mayor, aldermen and common council, this is bad on demurrer, but will be cured by a verdict finding the election by the mayor, aldermen and common council, for that finds that there were a mayor, aldermen and common-council, legally constituted, to which the swearing is essential.

(449) 2 Chest. Ca. 549.

(450) 2 Chest. Ca. 551.

451. The Court will only notice so much of the Charter. charter as is set out in the proceedings, for which reason each party must set forth all that upon which he means to rely, unless it is already shown by the anterior pleadings. But it is not necessary to show any part of the charter which is not relevant to the question.

452. It must show in whom the right of election and admission to the office which he claims is vested. That is, if vested in the Corporation at large, it is unnecessary to aver it, for being incidental in them, it is implied by the law until the contrary is shown: but if vested in a select body, it must appear how that body is constituted and how it became possessed of the right; an averment that it is vested in such a body is not sufficient; but the custom or clause in the charter conferring it upon them must be specially set forth. Who electors, &c.

453. It must show the custom or clause of the charter which prescribes the time and manner of making the election, and this must appear in certain. Therefore if it allege that at that time, and two hundred years last before, the election was made in a particular manner, except where there was a by-law in force to vary it, if the plea rely on that manner of election, it must set it forth particularly, and aver that there was no by-law in force to vary it. Mode of electing.

454. If the plea set forth a clause in the charter, appointing the election to be made according to the mode

(451) *R. v. Smith*, 2 M. S. 597.

(452) *R. v. Lyme Regis*, Doug. 153.

(453) *R. v. Birch*, 4 T. R. 610.

(454) *R. v. Birch*, 4 T. R. 610. *R. v. Haythorne*, 5 B. C. 427.

in use at a particular time, it must contain a statement of the mode which prevailed at that time.

455. An allegation that there is a custom to hold a Monday court, and that the burgesses being present and assembled there for that purpose *have* elected, is insufficient; it should show either that such Court was appointed by the custom for the particular purpose of such election, or that the Court was to be convened upon certain notice for an election.

456. But it is only necessary to set forth so much of the form as is material, and may omit stating what is merely ministerial. As if it be the custom for the Corporation to elect at a court held in the morning, and for a jury of the leet to present the person elected to the steward at the evening court, by a memorial in writing; and for the steward to admit and swear him in; the plea is sufficient although it omit to show the custom for the jury to present, because that office is merely ministerial and a duty; the omission of which does not invalidate the defendant's title, for if elected by the corporators and admitted by the steward, his title is good, although the jury presented another person.

457. If the plea set forth a prescriptive right of introducing freemen by the election and admission of the body at large, and then set forth a right of introducing them by the mayor and common council, unless it show some charter, or at least by-law, by which the right has been transferred from the body at large, to the select class the plea is bad; and it cannot be helped by show-

(455) R. v. Hill, 4 B. C. 443.

(456) R. v. Rowland, 3 B. A. 134.

(457) R. v. Holland, 2 East, 74.

ing that in fact, the right is vested in the body at large, but exercised by the mayor and common council as their representatives.

458. It must show a vacancy of the office to which he was elected; and if it have previously set forth the manner of election to that office by a select body, upon vacancies occurring by reason of particular events only, as by amotion or death of the mayor within the year, it must appear that the vacancy into which the defendant was elected occurred in consequence of one of these events; for unless the plea have negatived a different manner of electing on vacancies happening in other cases, if it appear that this vacancy occurred upon the charter day, or by death of the mayor, after the expiration of his year or any different event, the plea is defective.

Vacancy.

459. It must then show an election of the defendant by a legal majority of the body in whom the power is vested, according to the form and into the vacancy, as before set forth, together with a subsequent legal admission.

Election of defendant.

460. The election was to be made by the *then* residue of the mayor and aldermen; the constitutional number of aldermen, including the mayor, was twelve, six were present at the assembly; it was necessary therefore that it should appear by the pleadings that there was one vacancy among the aldermen. An allegation that the mayor is *dead* sufficiently shows such a vacancy, for the Court will not presume an intermediate election; but

By sufficient electors.

(458) R. v. Smith, 2 M. S. 597.

(459) R. v. Holland, 2 East, 74.

(460) R. v. Smith, 2 M. S. 599, 600.

an averment which shows that the office of mayor is vacant is not sufficient, for though the alderman who was mayor have ceased to hold the latter office, he may still be living and hold the office of alderman.

461. When burgesses are constituted by election, an averment by the defendant that he was *nominated* burgess is vicious, for election and nomination are by no means synonymous.

Conclusion. 462. The plea to the ancient writ must have concluded, after stating the facts on which the title to a franchise was founded, with *eo warranto, &c.*; and in imitation of it, the modern plea to the information should conclude, and by this authority, &c.

Insufficient
plea, &c.

463. When the defendant pleads or demurs, and his plea or demurrer amounts to a confession of the user of the office, and he fails in the justification or the cause of demurrer, judgment must pass against him, and a repleader will not be awarded, although the plea raised an issue immaterial whichever way determined.

464. If the prosecution were commenced within six months after his admission, the defendant on the trial must show that he had received the sacrament within the time limited by the statute, or that he has subsequently qualified under the Indemnity act, although no exception was taken on that account at the time of election or since, and although he has no intimation from the relator that such proof will be required.

(461) *R. v. Lisle*, Andr. 174.

(462) *Strata Marcella*, 9 Co. 27. a.

(463) *R. v. Philips*, 1 Str. 397. *R. v. Boyles*, 2 Ld. Ray. 1560.

(464) *Tufton v. Nevinston*, 1 Str. 585 S. C. 2 Ld. Ray. 1354.

465. "Upon the demise of any king or queen of this realm, all pleas to informations in the Court of King's Bench shall stand and be good in law without calling defendants to plead again to the same, unless the defendants desire to do so, and make request to the said Court for that purpose within five months next after such demise."

III. REPLICATION, &c.

466. "And such person or persons who shall sue or prosecute such information or informations in the nature of a quo warranto, shall proceed thereupon (the plea) with the most convenient speed that may be; any law or usage to the contrary thereof in any wise notwithstanding."

467. "And in every such case, the prosecutor of such information may reply to such plea (of six years' possession) any forfeiture, surrender or avoidance by the defendant of such office or franchise, happening within six years before the exhibition of such information, whereon the defendant may take issue, and shall be entitled to costs in manner aforesaid."

468. The relator may demur to the whole plea, and at the same time deny particular parts of it. Semb. And demurrer.

469. A prosecutor may reply specially, and put as many matters in issue as he pleases, but the new matter Immaterial matter.

(465) 4 & 5 W. & M. c. 18. s. 7.

(466) 9 Anne, c. 20. s. 4. V. Part II. tit. 435, 6.

(467) 32 Geo. III. c. 58. s. 2. V. Part I. tit. 747.

(468) R. v. Ginever, 6 T. R. 733. n.

(469) R. v. Latham, 3 Bur. 1487. S. C. R. v. Lathrop, 1 W. B. 471. R. v. Knight, 4 T. R. 424.

introduced in the replication ought to be consistent with that contained in the plea. Therefore if the defendant set up a title under an old charter, insufficient because a new charter has been granted altering that mode of election, the replication may set forth the new charter, for it is consistent with the plea, but an addition of that which defeats it. But if the defendant allege a custom for the Corporation to elect freemen from certain classes *ad libitum*, and the replication traverse that custom, and proceed to introduce an allegation that persons have been admitted to the freedom in right of servitude, and that no one ought to be admitted who has not served a certain apprenticeship, &c. this supplemental matter is all surplusage; a rejoinder to that alone is a departure from the plea, and any issue arising out of it is immaterial.

Previous
qualifica-
tion.

470. If the defendant set forth in his plea the possession of a necessary previous qualification, the replication may impeach that qualification, and the Court will not restrain the relator in this respect, although it introduce a trial of the defendant's title to a different franchise from that for the usurpation of which the information is granted. As if the information were granted against him for usurping the office of common-councilman, and the plea set forth that the defendant at the time of his election was a freeman, which was a necessary qualification for being elected a common-councilman, the replication may impeach his title to the freedom.

471. A replication that the Corporation was not in due manner assembled for the purpose of electing bur-

(470) *R. v. Brown*, 4 T. R. 277. *Piper v. Dennis*, 12 Mod. 253.

(471) *R. v. Hill*, 4 B. C. 443.

gesses is sufficient, for the words "in due manner" will not injure, they are superfluous only in alleging that which the law would have implied in the simple averment, that the Corporation was not assembled for the purpose of electing.

472. The relator may impeach the title of the person who presided at the assembly where the defendant was elected, although he was an officer de facto; for the legality of his election depends upon the legality of the assembly at which it took place, to which it is essential that the legal head officer presided. And this may be done, it seems, although the person who presided is since dead, particularly if proceedings had been commenced to oust him, and discontinued only by his death. And judgment of ouster against such a person is conclusive against the defendant, unless he can defeat it on the ground of fraud or collusion. But this right to impeach the title of the president is subject to the restrictions of the statute of George the Third.

President's title.

473. If issue be joined on the fact that "A. was mayor at the time of the defendant's election," the issue is whether A. was the legal mayor, and not whether he was mayor de facto.

474. If the election of the defendant depend upon the legality of the titles of voters, who do not elect in

Voters title.

(472) *R. v. Hebden*, 2 Str. 1109. S. C. Andr. 392. *R. v. Spearing* in *R. v. Stacey*, 1 T. R. 4. n. *R. v. Smith*, 5 M. S. 279. V. Part I. tit. 729. 32 Geo. III. c. 58. s. 3.

(473) *R. v. Smith*, 5 M. S. 280.

(474) *R. v. Penryn*, 8 Mod. 216. *R. v. Pyke*, 8 Mod. 287. *R. v. Hebden*, 2 Str. 1109. S. C. Andr. 391. *Symmers v. Regem*, Cowp. 503. *R. v. Grimes*, 5 Bur. 2601. *R. v. Mein*, 3 T. R. 598. *R. v. York*, 5 T. R. 72. *R. v. Hughes*, 4 B. C. 377. 378. *R. v. Smith*, 5 M. S. 279.

right of a corporate franchise, so that they cannot be impeached by an information in the nature of quo warranto against themselves, the relator may impeach and put them in issue to defeat that of the defendant. But where an information could have been obtained against the electors individually, as in all cases where they elect in right of a corporate franchise, it is sufficient for the defendant that they were de facto in enjoyment of their franchise, and the relator cannot impeach their titles. But if a judgment of ouster have been intermediately obtained against any of the electors on whose title that of the defendant depends, the record of this judgment may be shown on the trial, and is conclusive against the defendant, unless he can impeach it on the ground of fraud or collusion.

Not duly
elected.

475. To a plea of election according to the provisions of the governing charter of the Corporation, the relator should reply not duly elected, for this puts in issue every thing which can be investigated in this proceeding.

476. If the defendant in his plea treat his admission as an election, and the prosecutor take issue upon it as an election, it is not competent for them to treat it otherwise on the trial, so as to impugn the pleadings on that account.

Argumen-
tative.

477. A replication that 50 votes tendered for another candidate were improperly rejected, and 38 tendered for the defendant improperly admitted, and that the majority of legal votes tendered was in favor of the other

(475) *R. v. Hughes*, 4 B. C. 376.

(476) *Symmers v. Regem*, Cowp. 501.

(477) *R. v. Hughes*, 4 B. C. 377.

candidate, is argumentative that the defendant is not duly elected, and therefore insufficient.

478. If the defendant in his plea rely upon a qualification as introduced by the charter, and in his rejoinder set out a by-law introducing a different qualification, and rely on that, it is a departure; for if he intended to rely upon the by-law he should have set it out in his plea. Departure.

IV. TRIAL.

479. Upon a suggestion that an impartial trial cannot be had in the same county, the Court will award the venire into the county next adjoining. And on an application to remove the proceedings from the county of the city of Chester, the venire will be awarded into the county of the palatinate. In next county.

480. A trial at bar will be granted when it appears that a question of great importance will arise, that the constitution of the Corporation depends upon the issue, and there is much difficulty anticipated from the nature of the evidence. But not merely because the existence of the Corporation depends upon the issue, or that freeholds of great value are involved in the question. At bar.

481. The Court will grant a new trial on an informa- New trial.

(478) *R. v. Weymouth*, 7 Mod. 374. S. C. 4 Bro. P. C. 464. Sed vide *R. v. Hughes*, 4 B. C. 368. V. Part II. tit. 504.

(479) *R. v. Amery*, 1 T. R. 368. *R. v. St. Mary*, 7 T. R. 735.

(480) *R. v. Whitchurch*, 8 Mod. 211. *R. v. Amery*, 1 T. R. 364. n. 367.

(481) *R. v. Francis*, 2 T. R. 484. *R. v. Ellames*, 7 Mod. 224. S. C. C. T. H. 48. *R. v. Bennett*, 1 Str. 105. *Musgrave v. Nevinson*, 1 Str. 594. S. C. 2 Ld. Ray. 1358. *R. v. Bell*, 2 Str. 995. 1105. *Smith d. Dormer, v. Parkhurst*, 2 Str. 1105. *R. v. Blunt, Say*, 102. *Gay v. Cross*, 7 Mod. 37. *Bright v. Eynon*, 1 Bur. 395. *R. v. Jones*, 8 Mod. 208.

tion in the nature of quo warranto, as on any other form of proceeding, for it is now regarded as a civil action in essence, although criminal in form. Some years ago there was much doubt entertained on this point, when the verdict had been given for the defendant; for the proceeding was considered to be of a criminal nature: but the contrary doctrine has subsequently been so firmly established that a new trial will be granted, even after a trial at bar, where there is any misconduct in the jury or the verdict is plainly against evidence.

V. JUDGMENT.

Motion in
arrest of

482. If there be verdicts for the defendant on some of his pleas, and judgment on demurrer for him on the rest, motion may be made on behalf of the crown to stay the defendant from entering up his judgment, on the ground, that it appears on his own showing that he is not entitled to the office, on account of a defect in the nomination on which his election was founded, that not having been previously contested.

483. If any material issue be found for the crown, by which it appears that the defendant has no title, there must be judgment for the crown, although several issues were found for the defendant.

484. There was a mis-trial and verdict against the queen on quo warranto, the Court directed that the postea should not be certified, for otherwise the defend-

(482) *R. v. Nance*, 7 Mod. 341.

(483) *R. v. Leigh*, 4 Bur. 2145. *R. v. Hebden*, Andr. 391.

(484) *Neville v. Payne*, Cro. Eliz. 305.

ant might exemplify the verdict as duly tried, which would be evidence against the queen.

485. "In case any person or persons against whom any information or informations in the nature of a quo warranto, shall in any of the said cases be exhibited in any of the said Courts, shall be found or adjudged guilty of an usurpation or intrusion into, or unlawfully holding and executing any of the said offices or franchises, it shall and may be lawful to and for the said Courts respectively, as well to give judgment of ouster against such person or persons of and from any of the said offices or franchises, as to fine such person or persons respectively, for his or their usurping, intruding into or unlawfully holding and executing any of the said offices or franchises."

486. If there be two modes of acquiring title to the corporate freedom, and the defendant relying on one of them do not show a good title acquired in the mode on which he relies and professes to claim, judgment must be against him, although it appear by the pleadings that, had he chosen to rely on the other mode, he might have made out a good title.

On title shown, though a better might have been produced.

487. When the proceeding was founded on a usurpation of a franchise, which might be repossessed and enjoyed by the crown, the judgment was of seizure into the king's hands, under the ancient writ.

Seizure.

(485) 9 An. c. 20. s. 5. Vid. Part II. tit. 353.

(486) R. v. Leigh, 4 Bur. 2145. Symmers v. Regem, Cowp. 506.

(487) R. v. Hertford, 1 Ld. Ray. 426. Strata Marcella, 9 Co. 25. b. R. v. Hearle, 1 Str. 627.

Ouster.

488. When the judgment is founded on the usurpation of a franchise which continues to exist, as a Corporation or a corporate office, but which the king cannot possess and enjoy, it must be of ouster of the individual or individuals, who were guilty of the usurpation, from the franchise or office usurped, and of fine for the misdemeanor. Hence it arises that the information must be against the individuals who usurp the franchise of being a Corporation (if it be sustainable at all in this case), and not against the body in its corporate name; when in fact there has been such a legal Corporation constituted, but none of the officers or members de facto have a legal right, having forfeited the franchise after coming in by an originally good title.

No judgment
quousque.

489. If the title of the defendant be defective in the admission only, his qualification and election being sufficient, yet as he has not a legal title, the judgment must be absolute against him, and concludes him from again setting up the former title, repaired in the defective point by a subsequent admission. It was at one time suggested that there might be a judgment quousque, as that the defendant should be ousted until he should be legally admitted; but it is now settled that if one have been duly elected and insufficiently admitted, the judgment must be of ouster generally; and before

(488) *R. v. Cusack*, 2 Rol. 115. *Virginia Comp.* 2 Rol. 455. *R. v. Dublin*, Palm. 1. *Strata Marcella*, 9 Co. 25. b. *R. v. Hertford*, 1 Ld. Ray. 426. *Smith's Ca.* 4 Mod. 58. S. C. 1 Show. 278. 280. *R. v. Grosvenor*, 7 Mod. 199. 2 Barnard. 391. *R. v. Hearle*, 1 Str. 627. *Symmers v. Regem*, Cowp. 510. *R. v. Carmarthen*, 2 Bur. 869. S. C. 1 W. B. 187. *R. v. Amery*, 2 T. R. 567. *R. v. Pasmore*, 3 T. R. 244. *R. v. Courtenay*, 9 East, 267. Form of judgment, *Hoblyn v. Regem*, 6 Bro. P. C. 517.

(489) *R. v. Pindar*, 8 Mod. 235. S. C. *R. v. Serle*, 8 Mod. 332. S. C. *R. v. Hull*, 11 Mod. 391. S. C. *R. v. Hearle*, 1 Str. 627. *R. v. Reeks*, 2 Ld. Ray. 1447. *Symmers v. Regem*, Cowp. 510. *R. v. Clarke*, 2 East, 83. *R. v. Courtenay*, 9 East, 267.

he can make a perfect title he must be again legally elected as well as admitted, as though he had before been a stranger to the franchise.

490. But if the defendant have been in possession of the office at first as a usurper, and since duly elected and admitted during his usurpation, there must be no judgment of ouster, for he has a good title to his office at the time of the judgment; but if the information charged him with a usurpation during the time when in fact he was a usurper, as well as the time subsequent, the judgment must be merely for a fine for the usurpation, for if judgment were to be of ouster, it would conclude his present title. As if the information be for usurping from the 20th of August to the exhibiting of the information in the following Hilary term, and the defendant confess a usurpation from the 20th of August to the 29th of September, and plead a sufficient election and admission on that day, and this be found by the verdict. Judgment of fine only.

491. There may be judgment for a fine against one who has usurped an office which has some time ago expired or been relinquished by him.

492. When the proceeding is founded on the assumption of a franchise which has never been created by the crown, as if individuals pretend to act as a Corporation or to have a market, when in fact no such Corporation was ever created or market granted by the crown, the judgment is quod extingatur, and that the persons who usurped it nullatenus intromittant, &c.; for by the judg- Of extinguishment.

(490) R. v. Biddle, 2 Str. 952. S. C. R. v. Taylor, 7 Mod. 172. S. C. 2 Barnard. 238. 281.

(492) Smith's Ca. 4 Mod. 58. S. C. 1 Show. 278. 280.

ment the pretended franchise is destroyed, and the usurpers are forbidden again to exercise it.

493. Quo warranto was brought against A. B. and C., and several other aldermen of Dublin, who pretended to be a Corporation and to have certain privileges : it appeared that these privileges were greater than the crown could grant, and the judgment was that the privileges should be seized, and that neither they nor their successors *ullo modo se intromittant et quod excludantur de libertatibus et capiantur pro fine.*

Fine some
times nominal.

494. When a verdict is found against the defendant, the Court usually imposes a mere nominal fine, for the sake of form ; but if the usurpation have been attended with gross misconduct, they will impose a heavy penalty by way of punishment.

Ouster at
common
law.

495. It has been said that judgment of ouster does not go on the information at common law, but this is, I imagine, an error.

Judgment
under statute
referred to common law.

496. If judgment be given according to the statute in a case not within its provisions, but where the same judgment in effect, or a portion of it, ought to have been given, as upon an information at common law, it may be reversed as under the statute, and affirmed as far as it is good at common law. As if there be judgment of fine for the usurpation and costs of the relator, in a case not within the statute, it may be reversed as to the costs, and affirmed as to the fine.

(493) Corporation of Dublin, in Error, 1 Palm. 1—9.

(494) R. v. Cracker, 8 Mod. 286.

(495) R. v. Williams, 1 Bur. 408.

(496) R. v. Williams, 2 Kenyon, 75. S. C. 1 Bur. 407.

497. The judgment under the statute in the King's Bench must be, "and that the relator recover his costs of the proceeding." And if the case come before the House of Lords on error, and judgment for the defendant be reversed there, they must give the same judgment as the Court below ought to have given, had the judgment been originally entered for the plaintiff.

Judgment
of costs.

498. The judgment upon the ancient writ was upon the mere right, for it was the king's writ of right, and the highest which he could have; therefore if it was given for the defendant, the crown was concluded for ever. But on the information, the judgment for the defendant holds only against that particular proceeding, and another information may be granted by the Court at their discretion, to impeach the same title. But in both cases judgment for the crown is conclusive.

Judgment
for defend-
ant on writ
final.

Not so on
informa-
tion.

499. If the defendant disclaim, judgment shall be immediately entered for the king.

Judgment
on dis-
claimer.

VI. AMENDMENT.

500. The statute for the amendment of the law and the statute of jeofails are extended to proceedings in quo warranto under the statute of Anne.

501. The prosecutor will not be allowed to amend his affidavits, defective in showing the acceptance of a

Affidavits.

(497) *R. v. Amery*, 1 Anstr. 183.

(498) *Strata Marcella*, 9 Co. 28. *Anon.* 12 Mod. 225. *R. v. Trinity House*, 1 Sid. 86. *R. v. Carpenter*, 2 Show. 47.

(499) *Co. Ent.* 527. b.

(500) *V. Part II. tit. 272.* 9 An. c. 20. s. 7.

(501) *Vid. Part II. tit. 375.* *R. v. Barzey*, 4 M. S. 255.

charter on which he relies, but the Court will dismiss the application.

Informa-
tion.

502. The information may be amended by striking out the name of the relator, and substituting that of a more proper person.

Plea.

503. The plea may be amended on terms after the issue has been carried down to be tried and the trial gone by, on account of a challenge made to the array by the defendant, or indeed at any time before verdict; so it may be amended after argument on the demurrer at any time before the Court have decided, if it were such that an issue upon it must have been immaterial. But the Court will allow such amendments only as will tend to forward the justice of the case, and will impose such terms on the parties as they deem proper. And they will require that it appear by affidavits that the bad pleading originated in error, and was not introduced intentionally, for the purpose of delay. Yet leave to amend will not be refused solely on the ground that a trial has been lost.

Plea de
novo.

504. Or the Court will on terms allow the defendant to withdraw his plea at any time before trial, and change his ground of defence; as if his first plea relied upon an election according to the prescriptive form, he may be allowed to withdraw that, and in his new plea to rely

(502) *R. v. Symmons*, 4 T. R. 224. *R. v. Wynne*, 2 M. S. 347. n.

(503) V. Part II. tit. 273. *R. v. Armstrong*, Andr. 109. *Attorney General v. Trinity House*, 1 Sid. 54. *R. v. Ellames*, 7 Mod. 224. S. C. 2 Str. 975. S. C. C. T. H. 42. 50. *S. C. Cunningham*. 44. *R. v. Phillips*, 1 Kenyon, 539. S. C. 1 Bur. 304. *R. v. Birch*, 4 T. R. 610. *Phillips v. Smith*, 1 Str. 136.

(504) *R. v. Grimes and R. v. Blatchford*, 4 Bur. 2147.

upon a form of election introduced by a charter, to the exclusion of that prescription.

505. Where an immaterial issue has been tried, the Court will set aside the verdict, and on a subsequent motion, if the pleadings can be amended so as to raise a material issue and administer complete justice between the parties, they will order it to be done on payment of costs, &c. by him with whom the error originated. This they do instead of granting a repleader, and it may be done after a general verdict, though there were several other issues joined, if no evidence have been adduced upon them. And of this nature is an issue, "whether sworn in the manner directed by the charter," where the question is on a swearing after an election under the statute of George. For such an issue can determine nothing, and the Court has great reluctance to conclude the defendant's title to an office or franchise solely on the ground of bad pleading.

Plea amended instead of repleader.

506. But it will not be granted where a material issue has been found for the crown, although it appears by the record that the defendant had a better defence, on which he neglected to rely; as if his plea set up an election according to the prescriptive manner, on which a verdict was found against him; although it appears from the pleadings that he might have made out his title under a charter set forth in the replication, had he chosen to rely on it.

When no repleader.

507. Nor will it be granted after an immaterial issue, where there is a more expeditious way of determining

(505) R. v. Philips, 1 Bur. 304. S. C. 1 Kenyon, 539. Symmers v. Regem, Cowp. 505. 510.

(506) R. v. Leigh, 4 Bur. 2145. Symmers v. Regem, Cowp. 506.

(507) R. v. Philips, 1 Str. 397.

the cause ; as if it appear to the court on the motion for the repleader, after an immaterial issue on a usage inconsistent with the charter shown, that the plea amounts to a confession of the usurpation, it being evident from the charter that the defendant has no title.

Judgment
amended.

508. An error in the judgment may be altered after the term in which it was entered, when an evident mistake ; as if in a disclaimer of liberties usurped, there be a mistake in setting out the date of the charter under pretence of which they had been usurped.

509. If the judgment be entered without including the plaintiff's costs, in the Court of King's Bench it may be altered in the same term, but not afterwards. So if such defective judgment be entered for the plaintiff in the House of Lords, on reversal of judgment for the defendant in King's Bench, it may be amended during the same session, but not afterwards.

VII. COSTS.

(1.) *Prosecutor's.*

At common
law.

510. On judgment for the crown at common law, there was no judgment for costs, but only of ouster and capiatur pro fine, and costs cannot be given at present for the prosecutor, except in cases within the statutes ;

(508) Tufton and Ashley, Cro. Car. 144.

(509) R. v. Amery, 1 Anst. 183.

(510) R. v. Williams, 1 Bur. 402. S. C. 1 W. B. 93. R. v. Wallis, 5 T. R. 380. R. v. Richardson, 9 East, 469. R. v. Hall, 1 B. C. 237. R. v. M'Kay, 5 B. C. 641.

so that if the judgment be entered with costs, the Court will set it aside in that respect.

511. "And also it shall and may be lawful to and for the said courts respectively to give judgment that the relator or relators in such information named, shall recover his or their costs of such prosecution, to be levied in manner as aforesaid." Under statutes.

512. If any one material issue be found for the relator, so that judgment of ouster is given against the defendant, the relator is entitled to his costs upon all the issues, although it appear that the defendant might have made out a good title, had he at first relied upon another mode of proceeding. Costs on all the issues.

513. When the defendant is detained in execution, as well for the relator's costs indorsed on the writ, as for the contempt, he is not entitled to be discharged on payment of the fine only. But, as that is merely nominal, and the costs are to be considered as the costs in a civil suit, it is no objection to his being discharged out of custody under the lords' act. Execution, discharge from.

(2.) *Defendant's.*

514. "The clerk of the crown in the Court of King's Bench shall not, without express order to be given by the said Court in open court, exhibit, receive or file

(511) 9 Anne, c. 20. s. 5. Vide Part II. tit. 258.

(512) R. v. Leigh, 4 Bur. 2143. R. v. Downes, 1 T. R. 453.

(513) R. v. Pickerill, 4 T. R. 809.

(514) 4 & 5 W. & M. c. 18. s. 2.

any information for trespasses, batteries or other misdemeanors, or issue out any process thereupon, before he shall have taken or shall have delivered to him a recognizance from the person or persons procuring such information, to be exhibited with the place of his, her or their abode, title or profession, to be entered to the person against whom such information or informations is or are to be exhibited in the penalty of 20*l.* that he, she or they will effectually prosecute such information or informations, and abide by, and observe such orders as the said Court shall direct, which recognize the said clerk of the crown, and also every justice of the peace of any county, city, franchise or town corporate, (where the cause of any such information shall arise), are hereby empowered to take; after the taking whereof by the said clerk of the crown, or the receipt thereof, from any justice of the peace, the said clerk of the crown shall make an entry thereof upon record, and shall file a memorandum thereof in some public place in his office, that all persons may resort thereunto without fee; and in case any person or persons against whom any information or informations for the causes aforesaid, or any of them shall be exhibited shall appear thereunto and plead to issue, and that the prosecutor or prosecutors of such information or informations, shall not at his and their own proper costs and charges, within one whole year next after issue joined therein, procure the same to be tried, or if upon such trial a verdict pass for the defendant or defendants, or in case the said informer or informers procure a *noli prosequi* to be entered; then in any of the said cases, the said Court of King's Bench is authorized to award to the said defendant and defendants his, her or their costs, unless the judge before whom the information shall be tried, shall at the trial of such information in

open Court, certify upon record that there was a reasonable cause for exhibiting such information; and in case the said informer or informers shall not within three months next after the said costs taxed, and demand made thereof, pay to the defendant or defendants the said costs, then the said defendant and defendants shall have the benefit of the said recognizance to compel *them* thereunto."

515. "This shall not extend to any other informations than such as shall be exhibited in the name of their majesties coroner or attorney in the Court of King's Bench for the time being, commonly called the master of the Crown-office."

516. This act extends to informations in the nature of quo warranto, although they are not expressly included, for a usurpation of a public office or franchise, is a misdemeanor at common law.

517. "If judgment shall be given for the defendant or defendants in such information, he or they for whom such judgment shall be given, shall recover his or their costs therein expended, against such relator or relators; such costs to be levied in manner aforesaid."

518. "If upon the trial of such information, the issue joined upon the plea aforesaid, (six years' possession) shall be found for the defendant or defendants or any

(515) 4 & 5 W. M. c. 18. s. 6.

(516) R. v. Hertford, Carth. 503. S. C. 1 Salk. 376. R. v. Morgan, 2 Str. 1042. R. v. Howell, C. T. H. 247. R. v. Filewood, 2 T. R. 145. R. v. Brooke, 2 T. R. 197. V. Tidd's Prac. 987.

(517) V. Part II. tit. 258. 9 Anne, c. 20. s. 5.

(518) 32 Geo. III. c. 58. s. 1.

of them, he or they shall be entitled to judgment, and to such and the like costs as he or they would by law have been entitled to, if a verdict and judgment had been given for him or them upon the merits of his or their title."

519. The defendant is entitled to costs if a verdict be found for him on an issue upon a replication of a forfeiture to his plea of six years' possession.

Rule discharged
with costs.

520. The defendant will be allowed his costs, if the rule nisi is dismissed in the following instances:—Where the merits as alleged by the prosecutor's affidavits, are clearly and satisfactorily answered; where the prosecutor might have ascertained the sufficiency of the defendant's title by consulting documents within his power; where the prosecutor's affidavits assert his *belief* that the defendant is non-resident, and those on the other side positively assert residence, and that the defendant had paid scot and lot. More especially will the applicant be compelled to pay costs when he must have known that the charge was false, frivolous or groundless; or where he seeks to enforce a by-law, contrary to his own agreement; or to impeach the title of the defendant on the illegality of the vote of one of the electors, whose vote he had himself received at his own election, unless the elector have been since ousted, which may afford some excuse for the prosecutor's conduct.

(519) 32 G. III. c. 58. s. 2. Vide Part II. tit. 467.

(520) R. v. Carpenter, 2 Str. 1039. R. v. Clarke, 1 East, 46. n. R. v. Hoyte, 6 T. R. 432. R. v. Wardroper, 4 Bur. 2025. R. v. Lewis, 2 Ken. 497. S. C. 2 Bur. 780. R. v. Mortlock, 3 T. R. 301. R. v. Peacock, 4 T. R. 686.

521. When the relator does not proceed to trial pursuant to notice, the case is within the equity of the statute of Anne, and he is liable to pay the costs of the defendant.

Not proceeding to trial.

522. The Court will stay the proceedings until security is given for the costs, when the relator is a stranger poor and under the direction of others, or even if a freeman being a mere faggot ; but not merely because he is insolvent, if a freeman.

Security for.

(3.) *Of either Party.*

523. If the costs are increased by long and unnecessary affidavits, or the introduction of a mass of unnecessary matter into the special verdict, the Court will direct the master to report the expence of the unnecessary matter.

Costs of unnecessary matter.

524. When judgment for the defendant is arrested, the question being of a very difficult nature, the Court will allow costs to neither party, either of the motion or the trial.

On arrest of judgment.

525. An agreement on the consent rule between the relator and defendant in quo warranto, that the matter shall be tried in a feigned action, and that the costs shall abide the event of the issue, includes the costs of the crown side as well as those of the civil proceedings, for those of the issue would follow of course, and therefore the argument would be otherwise nugatory.

On consent rule.

(521) *R. v. Powell*, 1 Str. 33. Anon. Say. 130.

(522) *R. v. Wynne*, 2 M. S. 347.

(523) *R. v. Monday*, Cowp. 540.

(524) *R. v. Spencer*, 3 Bur. 1827—1840.

(525) *R. v. Foxcroft*, 2 Bur. 1022.

CONCLUSION.

It was not from admiration of the corporate system, that I was induced to devote my attention to the laws by which it is regulated. Originating in a barbarous age, Corporations were confederacies of the people, to protect themselves against the insolence and aggression of the nobles. During an earlier period of our history, the greatest benefits were derived by the nation from these establishments, but long ago they have ceased to have any beneficial operation. Lawyers have amused themselves in tracing pretty similitudes between the integral parts of Corporations, and the legislature of this kingdom. The mayor, say they, is the municipal Sovereign; the aldermen are the nobles, constituting the House of Peers; the burgesses or common-council-men are the Commons, representing the freemen. And they infer that experience has shown this to be the best form of government, as well for a municipality as a nation. Pleased at this complaisant theory, I have endeavoured to discover the use of the complicated machinery. Of what use is the supremacy of the mayor? of what the dignity of the aldermen? of what the representative capacity of the burgesses? As Brutus says, "I pause for a reply." Were not two or three of those exalted personages gifted with the transcendent powers of justices of the peace, it might be difficult to understand how they could govern the unruly multitude committed to their charge. There is but one use which I ever could discover for the continuance of this gorgeous system. Members are returned to parliament in a mode far more convenient to a ministry than they would be,

were they elected by the people whom they are supposed to represent. If I may be allowed to suggest an alteration it would be fundamental; that is, the annulling of all charters of incorporation, and reincorporating the whole kingdom in extensive districts, upon the following plan:—

The kingdom is divided into a certain number of municipalities, more or less extensive, according to the populousness of the country. Of these the inhabitant householders who have resided as such during the last year, without receiving parish relief are freemen. The privileges of freemen are to serve on juries, to vote in the election of members of parliament, of magistrates and council-men, and as to the alienation of municipal property. There is no necessity of enrolment, admission or any other form to complete the title of freeman, but a fine is imposed on the clerk of the peace for neglect to enrol the names of those who become entitled to the freedom, or to enter a notification of their having received parish relief. The roll of freemen is made alphabetically, and divided into several lists, each containing a nearly equal number of names. Each list elects one magistrate, and two or three council-men annually, with others afterwards to supply occasional vacancies. The whole body of freemen elect one member of parliament. The magistrates constitute a judicial tribunal, with jurisdiction throughout the municipality, the senior present presiding; they empanel a jury, and have power to try certain offences, and determine actions founded on simple contract and torts, administering their by-laws as well as the law of the land. The magistrates individually have the power of committing offenders for trial, and summarily punishing trivial delinquencies. The councilmen possess the exclusive power of making and repealing by-laws consonant with

the general law, and have the care of corporate property, together with the disposal of its annual profits, but not of the principal. The offices of magistrates and council-men are incompatible; the one being the judicial, and the other the legislative body. Magistrates and council-men take an oath or make a solemn promise of allegiance to the constitutional government, and for the due discharge of their office. The omission of this form renders them liable to punishment, but does not affect their capacity before conviction. The law relative to a system of this kind, might be comprehended in a few pages, and easily understood; the powers of the magistrates might be defined, so as to avoid the necessity of verbose clauses which encumber every statute submitting any subject to the jurisdiction of justices of the peace. The election of members of parliament would be by the people whom they are said to represent: and all the vexations and tyrannous usages which prevail in Corporations might be swept away.

I pray that I may not be misunderstood: though I propose this system, I am not visionary enough to imagine that the present will be improved—to fancy that any parliament will be found willing to relinquish their influence over venal boroughs—that aldermen in the house will be allowed by their constituents to abandon the privileges of ancient cities and towns, however much in restriction of common right, however harassing to the subjects in general—that the majority of justices of the peace will deem their tenure of office and influence more secure under the election of their neighbours, than under the appointment of lords lieutenant, or that there are none alive to the grace and advantage of mystery, which, robed with it as with a garment, the Law might blush to throw aside.

I have travelled through this work, as a merchant

from Medina to Damascus, a weary waste of way : there is as little to gratify the mind in the investigation, as to please the eye in the desert, and at every step of my progress, I have contemplated the advantage of change : but should this treatise acquire a reputation as permanent as the system with which it is involved, though it can gain me no credit beyond that of a laborious collector, my name will not be among the most ephemeral of lawyers.



ADDENDA.

I.—PART I. TIT. 116.

THE direction of the charter was, that the mayor and citizens should nominate two of the said twenty-four aldermen, of whom one should be elected mayor by the said sheriffs and aldermen *then there* assembled—there must be a majority of the twenty-four aldermen.—R. v. Mayor of Chester, E. T. 8 Geo. IV.

II.—PART I. TIT. 101. 564. PART II. TIT. 393. 472.

If one having an inchoate right to the freedom by birth or apprenticeship, be admitted by an officer de facto, in undisturbed exercise of the office, the Court will not grant a quo warranto against him, to examine his title to the freedom, for the admission is a mere ministerial act, and the contrary doctrine would go far to disturb almost all the Corporations in the kingdom.—R. v. Slythe, H. T. 1827.

III.—PART I. TIT. 219. 228.

The charter which was confirmed by statute, declared quod nullus mercator extraneus faciat merchandizam within the town.—Lord Mansfield desired a translation

of the phrase *quod nullus faciat merchandizam*: the counsel for the Corporation replied "that none should sell."—Lord Mansfield, "he may buy, then? what think you, Mr. Chambre? (the counsel for the defendant) "No man shall manufacture."—The action was founded on this clause being an exclusion of foreigners from trading in the town.—*Berwick v. Johnson*, MSS.

IV.—PART I. TIT. 617.

A. being a capital burgess, is elected alderman and admitted, by which he manifests his assent to the election; the two offices are incompatible; A. acts as an alderman, or acquiesces in the election of B. to be a capital burgess in his place. In the event it appears that the election of A. to be an alderman is defective, for want of a legal majority of electors, and he disclaims or is ousted from the office. A.'s acceptance of the office of alderman, notwithstanding the defect, is an absolute vacation or resignation of the office of capital burgess, to which he is not remitted by the subsequent failure of title.—*R. v. Hughes*, 5 B.C. 892. *R. v. Hubball*, 6 B.C. 144.

V.—PART II. TIT. 75. 113.

It was sworn, that according to the custom of the borough, the names of the members of the Corporation were placed in a certain order of succession on the roll, and that the number of votes which each member was entitled to give, was regulated by the place of his name in the list, and that any member who had twice served the office of mayor, was entitled to have his name so placed, that he would have two votes. A mandamus will not be granted to compel the officer to

place the name of one who has been twice mayor in a particular situation : for if he be entitled to two votes it is unimportant where his name stands. — *R. v. Yarmouth*, M. T. 1826.

VI.—PART II. TIT. 164.

An exception may be taken to the original writ on the motion for a peremptory mandamus. — *R. v. Bristol Dock Company*, H. T. 1827. Law Journal.

VII.—PART II. TIT. 416.

Or who has voted in the election of the presiding officer under whom defendant was elected. — *R. v. Slythe*, H. T. 1827. Law Journal.

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BY-LAW — *continued.*

- on a special custom, I. 351.
 - follows it strictly, I. 352, 3, 4, 5, 6, 7.
 - what sufficiently special, I. 358, 9, 60.
 - regulating admission, I. 361, 2, 3.
 - portorage, I. 364.
 - must not exceed it, I. 365, 6, 7.
 - penalty on, reasonable, I. 368.
 - recoverable from whom, I. 158. 369, 70.
 - by whom, I. 350. 371, 2, 3, 4, 5.
 - in what court, I. 376, 7, 8.
 - by what process, I. 379.
- to enforce prescriptive right, I. 380.
- must be reasonable, I. 381.
- construed liberally, I. 382, 383.
- void in toto, I. 384, 5, 6, 7, 8.
 - part only, I. 389.
- directory or permissive, and not imperative, I. 390.
- of companies must be allowed by judges, I. 393, 4, 5.
- justification under, I. 455.
- pleaded as not extant, I. 427.
- proved, I. 427. 441, 2.
- remedy for injury under pretext of, I. 455.
- See *Office, Election, Eligibility, Vote, Nomination, Fees, Admission, Penalty, Oath, Enrolment, Qualification, Talliage, Trade, Naisance, Bond. Action, Departure.*

CANDIDATES,

- must be elected singly, I. 544, 5.
- right to a poll, see *Poll.*

CHARTER,

- title by the king's, I. 13.
- must be under the great seal, exception, I. 20.
- mode of incorporating by, I. 13, 14.
 - words of creation, I. 19.
 - effect of, I. 15.
- when it may incorporate de novo, I. 16.
 - for a limited time, I. 31.
- acceptance indispensable, I. 25.
- pleaded, I. 21, 33.
 - double, I. 22.
- profert unnecessary, I. 23.
- oyer not allowed, I. 23.
- copy not evidence, I. 24.
- record at the Rolls evidence, I. 24.
- void, being founded on an erroneous judgment, I. 18.
 - a void surrender, I. 877.

ANALYTICAL INDEX.

ABATEMENT,

affidavit to support plea of, II. 440.

See *Misnomer*.

ACCEPTANCE OF CHARTER,

indispensable, I. 25.

unconditional and perpetual, I. 26. 32.

in toto, cannot be partial, I. 26.

by a fraternity, I. 27.

nominees alone, I. 29.

definite and indefinite classes, I. 28.

members of former body and new men, I. 30.

pleaded or averred, I. 34.

ACTION,

for false return to habeas corpus. See *Return*.

mandamus, when it lies, II. 247. 280, 5.

on what falsity, II. 281.

though mandamus ought not to have issued, II. 282.

when barred by statute, II. 283, 4.

must be brought in B. R., II. 286.

when joint, II. 287.

against the individuals who made it, II. 288, 9, 90.

local, in what places, II. 291.

though it is not averred that defendants were bound to make the return, II. 292.

proof that it is defendant's return, II. 293.

averment of form of return, II. 294.

proof of falsity, II. 295, 6.

costs, II. 297.

on custom, in whose name, I. 182.

by corporation or treasurer, I. 182.

ACTION — *continued.*

on custom — *continued.*

by ancient guild, I. 183.

company of particular trade, I. 184, 5.

when maintainable in corporation court, I. 187.

when not, I. 186.

must show the defendant within it, I. 198.

removed by habeas corpus from London, I. 407.

on by-law, in assumpsit or debt, I. 396.

by whom, I. 397, 8.

in what court, I. 399, 400, 1, 2, 7.

stayed by prohibition, I. 404.

removed by certiorari, I. 404, 8.

from London, I. 407, 9.

by habeas corpus, I. 406.

from London, I. 407.

See *Declaration, Habeas Corpus.*

ADMISSION

fee, on taking office in companies, I. 300.

inchoate right of. See *Freedom.*

penalty of by-law for improperly admitting, I. 325.

right of, not conferred by a by-law empowering to admit, I. 390, I.

to office, &c. right of, in whom, I. 555.

indispensable, I. 524. 556, 7, 8.

a mere ministerial act, I. 559. 561.

when, I. 559, 60, 1, 2, 3, 4.

after long interval, unless there has been a waiver, I. 564.

by whom, I. 560, 1, 5, 6, 7, 8, 9. Addenda, No. II.

assent implied, I. 561. 570.

necessary, I. 569, 70, 71, 2, 3, 4.

dissent, evidence of, I. 578.

form of, I. 575, 7.

gives no title, I. 586.

stamps, I. 583, 4.

antedating, penalty for, I. 585.

See *Fees, Oaths.*

AFFIDAVITS. See *Mandamus : Quo Warranto ; Information (Criminal).*

ALDERMAN,

duration of office of, and of portman, jurat, capital burgess, &c.

I. 537. 758, 9, 60, 1, 2, 3.

AMENDMENTS,

in mandamus, under 9 Anne, II. 272.

statutes of jeofails, &c. II. 272.

formal, II. 273, 7, 8.

in substance, II. 273, 9.

in the writ, II. 274, 5.

return, II. 277, 8.

after trial, &c. II. 279.

in quo warranto, II. 272. 500, 1.

AMENDMENTS — *continued.*in quo warranto — *continued.*

in affidavits, II. 501.

information, by substituting a relator, II. 502.

essentially altering plea, II. 503.

before verdict or judgment on demurrer, II. 503.

costs on amending instead of repleading, II. 505.

when not allowed, II. 506, 7.

in judgment, when, II. 508, 509.

See *Plea ; Repleader ; Judgment.***AMOTION,**

power of, in whom, I. 629.

body at large, I. 629.

select body by charter, I. 634.

by-law, I. 634.

not incident to power of electing, I. 629. 634.

incident to power of appointing, I. 631.

presumable in a select body, when, I. 635.

cannot be reserved to the king, I. 632, 3.

not displaced by new charter, I. 630.

from office against which the offence was committed, I. 636, 7.

after restoration by mandamus, I. 638.

before conviction by a jury, I. 639, 646.

for offence purely corporate, I. 639.

against corporate duty, and also a misdemeanor, I.

640, 41, 2, 3, 4.

after conviction for a misdemeanor not being against his office,

I. 644, 5, 6, 7.

causes of :

bribery at corporate election, I. 642. 668.

razing books, I. 643. 664. 679.

non-user without special damage, I. 648.

determination of pleasure, when officer at will, 649, 50.

non-residence of aldermen, I. 655, 6, 7. 671, 2, 3.

non-attendance of recorder, 658. 660, 1. 675.

mayor, &c. I. 659.

common-councilman, I. 673.

portman, I. 674.

burgess, I. 676.

ignorance of law in recorder, I. 662.

not accounting, in a financial officer, I. 663.

misemploying corporate funds, I. 685.

poverty in an alderman, I. 665.

drunkenness, habitual, I. 666.

casual, I. 687.

disturbing corporate business, I. 644. 667.

saying he would not again come among them, I. 677.

age in an alderman, I. 678.

detaining corporate books, &c. I. 682.

bankruptcy or insolvency, I. 681.

AMOTION — *continued.*causes of — *continued.*

- insulting or libelling corporators, I. 647. 680.
- suing out of municipality, contrary to order, I. 683.
- refusal to pay fees, I. 684.
- revealing counsels of the corporation, I. 686.
- refusing advice to mayor, &c. by recorder, I. 688.
- advising and acting contrary to the mayor's direction, I. 689.
- not to pay duties claimed by the corporation, I. 690.
- original want of title, I. 669.

form of :

- notice to person amoved, I. 691, 2, 3, 4, 7.
- dispensed with, I. 695, 6.
- assembly of amoving body, I. 698.
- charge of offence, I. 694, 9. 701.
- defence allowed, I. 700.
- offence proved, I. 701, 2.
- of officer at pleasure, I. 649. 703.

by implication, I. 703.

effect of, I. 704, 8.

punishment of corporators for not amoving, II. 95.

See *Mandamus to Amove, Return.***APPOINTMENT and ELECTION,**

when convertible terms, II. 476.

APPRENTICE,

what sufficient service, I. 459, 60, 1, 2, 3, 4, 5.

See *Admission, Enrolment, Freedom.***ASSEMBLY,**

corporate, I. 58. 90. 540.

of majority of each definite class, I. 91. 93. 541.

some of indefinite class, I. 125.

of indefinite body, I. 127. 541.

select, I. 90.

of whom constituted, I. 92. 540.

interference of corporators who have no right to vote, I. 128.

on charter or periodical days, I. 59, 60.

averred, I. 61.

adjournment of, I. 60.

to elect, under 11 Geo. 1. — I. 129. 131, 32.

of common-council, I. 125, 26.

See *Election, Majority, Notice, Place, President, Time.***ASSUMPSIT,**action of, on by-law, &c. See *Action on By-law.***ATTACHMENT,**

when, II. 317.

against the individuals, II. 317.

when some willing to obey, II. 318, 19.

for not returning the peremptory writ, II. 314. 320.

pluries, II. 321.

ATTACHMENT — *continued*.

for not returning after peremptory rule to return the first writ, II. 322.
after a frivolous return, II. 323.

or return by one who has not authority, II. 323.

application for, II. 324.

on what service of writ, II. 325, 6.

sufficiency of the affidavits, II. 327, 8.

when not granted, but a feigned issue allowed, II. 329.

kinds of, II. 330.

BOND,

in aid of void by-law, is void, I. 349.

BRIBERY,

avoids election, I. 551, 3, 4. See *Amotion*.

BURGESS,

duration of office, I. 763.

See *Amotion, Office, Election*.

BUSINESS,

of charter day must not be postponed, I. 139.

BY-LAW,

who may make, I. 229.

or repeal, I. 237. 285.

body at large, I. 229. 230.

in particular cases only, I. 231. 233.

extent of their power, 238.

in no case, I. 233.

select body, I. 232.

in name of corporation, I. 236.

extent of their power, I. 238.

no others may vote, I. 235.

under the ancient, though professedly under a void charter,
I. 239.

guardians of the peace may not, I. 240.

companies, I. 241.

municipal corporation for companies, I. 242.

power of making under custom, I. 242.

extends to new franchise, I. 243. 252.

transferred from body at large to select class by a by-law,
I. 253, 8.

who bound by :

freemen, I. 244, 5, 8.

residents, &c. I. 244, 6, 9, 50. 340, 6, 367.

resident freemen, I. 248.

notice of, I. 247.

penalty of, by whom recoverable, I. 350.

enforced by fine, I. 449, 51.

forfeiture, I. 450.

imprisonment, I. 452.

disfranchisement, I. 454.

BY-LAW — *continued.*

- on a special custom, I. 351.
 - follows it strictly, I. 352, 3, 4, 5, 6, 7.
 - what sufficiently special, I. 358, 9, 60.
 - regulating admission, I. 361, 2, 3.
 - portage, I. 364.
 - must not exceed it, I. 365, 6, 7.
 - penalty on, reasonable, I. 368.
 - recoverable from whom, I. 158, 369, 70.
 - by whom, I. 350, 371, 2, 3, 4, 5.
 - in what court, I. 376, 7, 8.
 - by what process, I. 379.
 - to enforce prescriptive right, I. 380.
 - must be reasonable, I. 381.
 - construed liberally, I. 382, 383.
 - void in toto, I. 384, 5, 6, 7, 8.
 - part only, I. 389.
 - directory or permissive, and not imperative, I. 390.
 - of companies must be allowed by judges, I. 393, 4, 5.
 - justification under, I. 455.
 - pleaded as not extant, I. 427.
 - proved, I. 427, 441, 2.
 - remedy for injury under pretext of, I. 455.

See Office, Election, Eligibility, Vote, Nomination, Fees, Admission, Penalty, Oath, Enrolment, Qualification, Tallage, Trade, Naisance, Bond. Action, Departure.

CANDIDATES,

- must be elected singly, I. 544, 5.
- right to a poll, see *Poll*.

CHARTER,

- title by the king's, I. 13.
- must be under the great seal, exception, I. 20.
- mode of incorporating by, I. 13, 14.
 - words of creation, I. 19.
 - effect of, I. 15.
- when it may incorporate de novo, I. 16.
 - for a limited time, I. 31.
- acceptance indispensable, I. 25.
- pleaded, I. 21, 33.
 - double, I. 22.
- profert unnecessary, I. 23.
- oyer not allowed, I. 23.
- copy not evidence, I. 24.
- record at the Rolls evidence, I. 24.
- void, being founded on an erroneous judgment, I. 18.
 - a void surrender, I. 877.

CHARTER—*continued*.

what acts under a void charter are void, I. 877.

See *Acceptance, Confirmation, Plea, Revival, Surrender*.

CHARTER-DAY. See *Assembly*.**CLASSES**. See *Integral Parts*.**COMMON-COUNCIL**,

nature of, I. 125, 6. 764.

when body at large, I. 125, 6. 764.

select body, must appear in the pleadings, I. 764.

powers of must appear, I. 792, 3, 4.

COMMON-COUNCIL-MEN, duration of their office, I. 764.

See *Amotion, Pleasure*.

COMMONALTY,

construction of the word, I. 521.

CONTRACT,

cannot be avoided by a by-law, I. 453.

CONFIRMATION,

what, I. 835.

by statute, I. 835.

magna charta, I. 835.

1 Ed. III. c. 2. s. 9.—I. 836.

effect of, I. 837.

London, by 2 R. II. c. 7.—I. 839.

2 W. M. st. 1. c. 8.—I. 183.

Oxford and Cambridge, I. 840.

by charter, I. 841.

acceptance of, I. 842.

operation as a grant, confirmation, or surrender, I. 843.

what alterations it introduces, I. 841, 4, 5, 7, 8, 9, 850, 51.

granting a new franchise beyond the municipality, I. 846.

CORPORATIONS,

municipal origin of, I. 113.

cannot be two in the same place, I. 16. 875.

custos of during seizure on default, I. 17. 31. 876.

form when complete, I. 54, 55.

incomplete, I. 56.

integral parts, I. 54.

COSTS,

in mandamus, II. 258.

under 12 Geo. III. when obeyed, II. 262.

on discharge of rule, II. 263, 4.

rejection of motion, II. 264.

superseding writ, II. 265.

withdrawing record, II. 266.

with sheriff's poundage, II. 267.

joint prosecutors jointly liable, II. 268.

in action for a false return, II. 297.

quo warranto. See *Judgment*.

on amending instead of repleading, II. 505.

omitted in judgment when amendable, II. 509.

COSTS—*continued.*

in quo warranto—*continued.*

for prosecutor, none at common law, II. 510.

under 9 Anne,—II. 511.

on all the issues, though only one found for him, II. 512.

discharge from execution for, under lords' act, II. 513.

for defendant under 4 & 5 W. M. II. 514, 5, 6.

9 Anne,—II. 517.

32 Geo. III.—II. 518, 19.

on dismissing the rule, II. 520.

not proceeding to trial, II. 521.

proceedings staid until security given for, II. 522.

to be paid by successful party introducing unnecessary matter, II. 523.

allowed to neither on arrest of judgment, II. 524.

on consent, rule to try an issue, II. 525.

CUSTOMS,

against common right not favored, I. 140. 141.

can only be in prescriptive corporations, I. 168. 188.

but may extend to franchises newly acquired, I. 168. 170, 71.

and to suburbs and liberties, I. 169.

excluding foreigners from trade &c. I. 142, 3, 4, 5, 148. 150.

unless licensed, I. 147.

when not violated, I. 149.

for company to have livery, &c. I. 152.

corporation to regulate carts, &c. I. 153.

imposing a fee or expense on officers, I. 154.

to file an information for an assault, I. 155.

scandal, I. 155. 175.

to disfranchise for scandal, I. 176.

for steward to nominate a leet jury, I. 156.

to distrain for penalty, I. 157.

and sell, I. 157.

seize as forfeited, I. 158, 159.

fine for assault on corporators, 160.

marrying orphan wards, I. 161.

imprison for eloigning orphans, I. 162.

refusing livery, I. 163.

to be sheriff or alderman, &c. I. 165.

contempt of court, I. 163, 164.

forestalling, I. 164.

penalty of reasonable, I. 166.

to whom, I. 167.

void, unreasonable notwithstanding a general confirmation by statute, I. 172.

to fine a town and levy on one inhabitant, I. 173.

steward to make by-laws for homage, I. 174.

leet jury to inquire at one court and present at next, I. 177.

to certify a custom in their own cause, I. 178.

to give judgment before appearance, I. 179.

CUSTOMS : — continued.

- to try by six jurors, I. 180.
- to create a company, I. 181.
- enforced by action. See *Action on Custom*.
- pleaded with precision, I. 189. 423.
 - in words not expressing usage, I. 190.
 - how much, I. 191.
 - with essentials, I. 193. 197.
 - with exceptions, I. 192. 209.
 - when not, in municipal court, I. 194. 403.
 - ill as to time, I. 196.
 - demurred to in municipal court, I. 199.
- certified from London, I. 200.
 - in Chancery, I. 202.
 - sufficiently, I. 203.
- judicially noticed on error, I. 195.
 - from London, I. 201, 205, 6.
- not examined by the court by inspection of books, I. 204.
- tried by a jury, I. 205.
 - only in courts of common law, I. 206.
- returned on habeas corpus, I. 207. 412.
- evidence of, from usage, I. 208.
 - of what antiquity, I. 210.
- proved as laid, I. 209.
- not destroyed by discontinuance of usage, I. 211.
 - exception, I. 211.
- violation of, not indictable, I. 212.
- trespass for seizure on void custom, I. 213.

CUSTOS,

- during seizure, I. 17. 31.
 - an individual, I. 876.
 - a corporation, I. 17. 31. 676.

DAMAGES,

- in mandamus, II. 258, 9.
 - must be found by the jury who try the cause, II. 259.

DEBT,

- action of, on by-law. See *Action on By-law*.

DECLARATION,

- in action on by-law :
 - must show capacity of plaintiff, I. 398.
 - his right to recover, I. 428.
 - by whom the by-law was made, I. 424.
 - their authority, I. 424.
 - the by-law in debt, I. 425.
 - replevin, I. 426.
 - not in assumpsit, I. 425.
 - defendant within its obligation, I. 429, 33.

DECLARATION — *continued.*

in action on by-law :

- must show defendant not within material exception, I. 430.
- demand of penalty, when, I. 431.
- defendant's offence clearly, I. 435.
- that office refused is in the corporation of right, I. 432.
- that plaintiff is in no default, I. 437.
- need not show notice of election, I. 434.
- by-law, I. 436.
- corporation court, or where held, I. 434.

DEFAULT,

in quo warranto. See *Seizure.*

DEMURRER,

to return of mandamus, II. 249.

plea to return, II. 252.

replication, II. 468. See *Quo Warranto, Judgment.*

DEPARTURE, II. 469. 478.**DEPUTY,**

by whom, I. 606.

deed, I. 606.

duration of his authority, I. 768.

DIRECTION,

of mandamus in corporate name, II. 132.

though there be no mayor living, II. 133.

to act in their several capacities, II. 134.

act to be done by a select body, II. 135, 6.

to select body by their corporate appellation, II. 137, 8.

must include only those who do the act, II. 139.

in their proper capacity, II. 140.

where in wrong name, how taken advantage of, II. 131.

DISCLAIMER,

in quo warranto, II. 439. See *Judgment.*

DISFRANCHISEMENT,

what, and by whom, I. 709, 710.

cause of :

holding court, and making entries in public books illegally and riotously, I. 712, 17.

poverty in a freeman, I. 713.

violating a by-law, I. 454.

assault, libel, or slander of corporator, I. 713.

that which supports an amotion, I. 716.

remedy for illegal, and injury therefrom, I. 718.

DISQUALIFICATION,

by holding office, 491, 4, 5, 6, 7, 8, 9, 500.

business, I. 502.

incapacity to execute the office, I. 503.

infancy, I. 404, 5.

absence, I. 503.

See *Residence, Eligible, Qualification.*

DISSENTERS,

exemption from office, I. 252. 596.

DISSOLUTION,

what is, I. 55. 852, 7, 8, 9.

effect of, I. 857, 8, 9, 60.

whether can be, I. 852.

by loss of an integral part, as chief officer, I. 55. 853, 4, 5.
aldermen, I. 55. 856.

by surrender of corporate franchise, I. 861, 3.

repeal of charter by scire facias for original voidability, I. 864, 5, 6.
forfeiture, I. 867, 8, 9.

proceedings in quo warranto, I. 869.

See *Surrender, Judgment.*

DISTRESS,

under by-law, good, I. 443, 4.

and sale, void, I. 445.

DISTRINGAS,

in quo warranto, II. 430.

DOCUMENTS,

corporate :

mandamus to obtain, I. 682. II. 11, 12.

action to obtain, I. 682.

custody of, in whom, II. 8, 9, 10.

authenticated, II. 3.

evidence, what are, II. 1, 2. 6. 13.

not, II. 4, 5.

copies, when, II. 7.

production of by custos, II. 13.

for corporate purposes, II. 13.

mandamus to compel, II. 13.

rule to, on account of razures, II. 14.

inspection and copies of by corporator, II. 15. 17, 18, 19, 20.

mandamus to obtain, II. 15. 21. 111.

for one having prima facie title, II. 16.

under statute for election purposes, II. 18, 19, 20.

rule for, II. 22.

motion for, II. 29.

on behalf of stranger, II. 22, 3, 4.

when denied, II. 25, 6.

when granted in mandamus, II. 27.

quo warranto, II. 28.

extent of, II. 22.

charter refused, II. 30.

poll-book must be specified, II. 31.

attachment for disobeying, II. 33.

obeyed at expence of applicant, II. 32.

See *Amotion.*

ELECTION,

mode of prescribed by statute unalterable, I. 292.

ELECTION—*continued.*

- of mayor on charter day, I. 529.
 - on prescriptive day, a month after a day certain, I. 530.
 - on day after, 11 Geo. I. — I. 531.
 - adjournment from, I. 533.
 - at what hour, under 11 Geo. I. — I. 531, 2.
- on mandamus. See *Mandamus*.
- mandamus, under 11 Geo. I. — I. 534.
- of members of definite class on fixed day, I. 535.
 - after vacancies, when no fixed day, I. 536.
 - of indefinite class, I. 536.
- of annual officers under 11 Geo. I. — I. 538.
- officers for life, I. 538.
- presence of person elected unnecessary, I. 542.
- form of, I. 544, 45.
- and appointment, when convertible terms, II. 476.
 - nomination, not convertible, II. 461.
- proved in mandamus, II. 256.
 - See *Assembly, Bribery, Plea, Charter Day, Vacancy, Mandamus*.

ELECTING,

- right of, in body at large, I. 513. 519, 20.
 - by implication, when not shown to be in a select body, I. 513.
 - reposed in select body by original charter, I. 514, 19, 20.
 - new charter, I. 515.
 - by-law, I. 516.
 - not by usage, I. 517, 18.
 - continues after required qualification has ceased, I. 522.
 - transferred from body at large to a select body by a by-law, I. 257. 267. 268, 9, 270, 1, 2.
 - by whom, I. 255. 258, 9, 260, 1, 2. 280.
 - to whom, I. 256. 273, 4, 5, 6, 7, 8. 283, 6.
 - power of electing officers, ut sup.
 - mere freemen, I. 257. 268, 9. 272. 282.
 - presumed in select body from usage, I. 265, 6. 281.

ELECTORS,

- title when put in issue on information against the elected, II. 474.

ELIGIBLE,

- none can be rendered, by by-law, I. 295.
 - or precluded, I. 294.

to freedom :

- non-residents when no restriction, I. 472.
- when restrained, I. 473, 4, 5, 6, 7.

to office :

- freemen only, I. 480.
- resident, I. 481, 2.
- officers of a certain class, I. 490, 1, 2.

See *Disqualification, Residence, Assembly, By-law*.

ENROLMENT,

of indentures may be required, I. 311.
 charter See *Surrender, Mandamus*.

ERROR,

a writ of, lies on mandamus under the stat. II. 270.
 not on mandamus at common law, II. 269.
 See *Peremptory Mandamus, Judgment*.

EXCEPTIONS,

to writ of mandamus in form, when, II. 163, 4. Add. VI
 on return, II. 166.
 fatal, II. 165. See *Amendment*.

FEES,

on admission of officers, I. 300. 319.
 apprentices, journeymen, &c. I. 320, 1, 2, 3, 4.

FINE,

when merely nominal on judgment in quo warranto, II. 494.
 See *Judgment*.

FORFEITURE, of office, what is not, I. 626, 8.

outlawry, I. 627.
 ipso facto vacates it, I. 627.
 rejoinder of to plea of six years' possession, I. 752.

FRANCHISES, kinds of, II. 332.**FREEDOM,**

inchoate right of, incidental to inhabitants, I. 456.
 by charter in inhabitants, I. 457.
 particular classes, I. 458.
 by-law concerning, I. 310.
 cannot be restrained by by-law, I. 316. 466.
 conferred or extended, I. 317. 467, 8, 9, 470, 1.
 by patent unaccepted by the corporation, I. 525.
 may be by patent accepted, I. 722.
 See *Qualification, Apprentice, Eligible*.

HABEAS CORPUS CUM CAUSA,

to London, to return customs or by-laws, I. 405. 410.
 declaration must be filed, I. 411.
 return must show customs, I. 207. 412.
 by-laws, I. 413.
 and customs, I. 413, 14.
 officer's authority to detain, I. 415.
 a narration of the proceedings, I. 417.
 without the record itself, I. 417.
 amended, I. 418, 19.
 allowed without plea, I. 416, 17.
 examining jurisdiction, I. 417.
 although there be a special privilege, I. 416.
 under an injunction of the court, I. 420.
 disallowed, I. 421.
 false, action on, I. 422.

IMPRISONMENT,

for refusing office, I. 305, 306.

disobeying by-law, 448. 452. See *Custom*.

INDEMNITY-ACT,

annual effect of. See *Title, Quo Warranto*.

INFORMATION,

criminal :

for refusing office. See *Office*.

libel, I. 825.

corruption in elective arrangements, I. 826.

bribery at election of corporate officers, I. 827.

offering a bribe, I. 828.

postponing proper business on charter-day, I. 829.

removing after restoration on mandamus, I. 830.

misapplication of corporate funds. I. 831.

false return to mandamus, when, II. 247. 280. 298.

against corporators in their natural capacity, II. 298.

mayor, for making it without consent of the majority, II. 299.

application for, is a waiver of action, I. 832.

must show corrupt motives, II. 300.

judgment, II. 301.

in the nature of quo warranto. See *Quo Warranto*.

IMPARLANCES,

in quo warranto, I. 434.

INTEGRAL

parts of a corporation, I. 54.

definite number of, I. 56. See *Dissolution*.

ISSUE,

to try a custom, when granted, II. 124. See *Costs*.

JUDGES,

when corporators cannot be, I. 797.

offices of two united, I. 787.

may act separately, I. 814.

action against for error does not lie, I. 817, 18, 19.

unless malice appear, I. 817.

in what cases entitled to double costs when defendants, I. 822.

See *Action, Jurisdiction, Justice*.

JUDGMENT,

in mandamus, II. 258.

cannot be unless the verdict include damages, II. 259.

as in case of a nonsuit, II. 260.

on traverse, II. 261.

in quo warranto on default. See *Seizure*.

on defective plea or demurrer, admitting usurpation, II. 463.

of ouster against president or electors, conclusive against the elected, II. 472, 3, 4.

for defendant, arrested, II. 482, 4.

JUDGMENT—*continued.*

in quo warranto—*continued.*

for crown, notwithstanding issues found for defendant, II. 483.

defendant might have shown a title, II. 486.

of ouster of defendant and fine, II. 485, 8. 495.

absolute and conclusive, though well elected, II. 489.

of fine only, II. 490, 1, 4.

final, of seizure, II. 487. See *Seizure*.

of quod extingatur, II. 492, 3.

erroneous, under the statute, good at common law, II. 496.

of disclaimer, II. 499.

under the statute must include costs, II. 497.

for the crown conclusive both on the writ and information, II. 498.

defendant conclusive on writ, not so on information, II. 498.

amendment of, II. 508.

as to costs in same term only, II. 509.

JURISDICTION,

of corporations, I. 769, 770.

exempt, I. 771, 2.

ne intromittat, I. 773.

concurrent, *ib.*

conuzance of pleas, I. 771, 2.

over what parties, I. 774, 5, 6, 7.

protected by 8 Hen. VI.—I. 784.

in forcible entries, I. 785, 6.

See *Action, By-law, Custom*.

JUROR,

when corporator cannot be, I. 798, 9.

JURY,

when cannot be empanelled by a sheriff who is a corporator, I. 808, 9.

JUSTICE OF PEACE,

corporate officers not so of right, I. 778.

or by implication, I. 780, 81.

some generally appointed by charter, I. 779.

office of cannot be delegated, I. 781, 2, 3.

power to make rates similar to a county rate, I. 788, 9.

See *Judges, Jurisdiction*.

MAJORITY,

of a definite class, what, I. 93. 115, 16.

when words for time being, I. 117, 18.

then and there assembled, Add. I.

surviving and remaining, I. 119.

specially required by charter, I. 120, 21.

less than by special provision, I. 122.

usage on doubtful charter, I. 123.

custom (evidence of), I. 124.

what necessary, I. 547, 548.

See *Votes, Election, Assembly, By-law*.

MANDAMUS,

- effect of, I. 555. 726. II. 74.
- object of, II. 34. 40, 41.
- prerogative writ, II. 34, 5.
- runs into exclusive jurisdictions, II. 35.
- motion for, II. 36.
 - after ouster, when made, II. 59.
 - who has preference, *ib.*
- on affidavits taken before a judge or commissioner of B. R. II. 38.
- showing constitution, II. 37. 83.
 - a sufficient case for the writ, II. 39.
 - complete title in prosecutor, II. 44. 84, 5.
 - default in defendant, II. 44. 84, 5.
- for restoration, need not aver former possession, II. 108.
- when it lies, II. 41.
- when not, II. 42.
- when default of other remedy must appear, II. 43.
- to compel mayor to preside, II. 46.
- to elect :
 - mayor, when, II. 45. 51, 2, 3.
 - after a void election, II. 54.
 - when doubtful right to hold over, II. 55.
 - not when office full de facto, II. 57.
 - but when mere color of office, II. 58.
 - officers of definite class, I. 535, 6. II. 47. 56.
 - members of indefinite class, II. 50.
 - one of two nominees, II. 48.
 - ministerial officers, II. 49.
 - merely directs to fill the vacancy, II. 60. 153.
 - when it appoints a time, II. 52. 61, 2, 9.
 - when not, II. 61. 153.
 - at court-leet, II. 62, 3, 4, 5, 6.
 - notice, by whom given, II. 67.
 - rule absolute, II. 68.
 - concurrent writs, II. 69, 70.
 - a second writ, II. 69, 70.
- to take office, II. 71.
 - cause against, II. 72, 3.
- to admit :
 - to what offices, I. 607. II. 75, 6. 82. Add. V.
 - and perform previous duties, I. 310. 361. II. 77, 8.
 - deputy, I. 608. II. 79. 81.
 - resistant, II. 80.
 - lies not when office full de facto, II. 87, 8.
 - usage against applicant, II. 89.
 - concurrent writs, II. 90.
 - rule absolute at first, when, II. 91.

MANDAMUS,

to amove :

for not obeying a statute, II. 92.

when does not lie, II. 93.

to consider of amotion, II. 93.

observation, II. 94, 5.

to restore :

to what offices, II. 96, 7, 8. 106.

deputies, II. 99.

mayor, after his year, II. 103.

though the office is filled, II. 102.

after suspension, II. 101, 7.

when refused, II. 100, 4, 5, 7.

rule nisi at first, II. 109.

to enrol indentures, II. 110.

certify election, II. 112.

deliver insignia, II. 113.

inspect corporate documents. See *Documents*.

proceed to judgment, II. 114.

complete an act when first writ insufficient, II. 115.

lies not to manage corporate property, II. 116.

See *Rule, Direction, Writ, Return, Plea, Peremptory**Mandamus, Costs, Error, Misnomer.***MAYOR.** See *Officer (Chief)*.**MISNOMER,**

what is, and what is not, I. 42, 44.

of head officer, when his name need not be mentioned, I. 52, 3.

in grant to a corporation, I. 42.

by a corporation, I. 43.

in pleading, I. 44.

abatement, I. 44. 50.

pleaded by a corporation, I. 49.

nonsuit, I. 44.

mandamus, I. 45.

return of, I. 45.

quo warranto, I. 46.

pleaded, I. 46.

bar, "no such corporation," I. 46.

replication, "both names," I. 47.

amended, I. 48.

when collaterally introduced, I. 51. See *Direction*.**NAME, I. 35.**

one only by charter, I. 37.

several by prescription, I. 36. 40.

by implication, I. 37.

for particular purpose only, I. 38.

new and change of, I. 5. 39.

revival by, I. 41.

NAME—*continued.*

new must be used, I. 39.

to enforce ancient rights, I. 39.

in rule for quo warranto, II. 427. See *Misnomer*.

NOMINATION,

mode of, may be introduced by by-law, I. 289, 290.

NOMINEES,

who may be, I. 510.

president under 11 Geo. I.—I. 511.

NON-RESIDENCE,

punishment for, II. 95.

See *Amotion, Mandamus, Quo Warranto*.

NON-RESIDENTS. See *Eligible*.

NOTICE,

of assembly customary, I. 59, 76.

on periodical days, I. 59, 60.

averred, I. 61.

at other times, I. 63.

to members of definite class, I. 64.

indefinite class, I. 65.

who not entitled to, I. 66, 67.

by whom issued, I. 69.

service of, I. 68, 70.

under 11 Geo. I.—I. 71.

parol, I. 72.

of time, I. 73.

of place, I. 89.

of business, I. 74.

unusual on periodical days, I. 62.

of amotion, I. 75.

to amoving members, I. 64, 83.

when unnecessary, I. 67.

person amoved, I. 83.

when unnecessary, I. 691, 2, 3, 4, 7.

waved, I. 695, 6.

See *Waver, Amotion, Return*.

NUISANCES,

by-law restraining, I. 336, 7, 8, 9, 340.

OATH,

of office cannot be imposed by by-law, I. 309.

nature of, I. 565, 9.

constitutes admission, I. 575, 7.

on New Testament, I. 576.

affirmation instead of, I. 576.

by statute of allegiance and supremacy on admission, I. 579.

by whom tendered, I. 580.

must be taken though not tendered, I. 582.

by officers of new corporations, I. 581.

not required of mere freemen, I. 479.

OATH—*continued*.

refusal of, a refusal of office, I. 596, 7.

See *Admission, Office, Action*.

OFFICE,

cannot be created by by-law, I. 297.

what may be, in a corporation, I. 767.

refusal of may be punished by imprisonment, I. 305. 588.

criminal information for, in what cases, I. 592, 3, 4, 5.

indictment, I. 589, 90, 1.

who punishable for, I. 609.

penalty of by-law, I. 296, 8, 9. 300. 587, 8.

payment of, when no exemption, I. 298. 587.

when without reasonable excuse, I. 301. 304.

for refusal before day of undertaking, I. 303.

of office of a new franchise, 302.

without notice of election, I. 307.

resignation of punished by by-law, I. 308.

mandamus to undertake, I. 587.

insufficiency to serve pleaded, I. 439.

shown under general issue, I. 439.

ineligibility pleaded, I. 440.

admission to who entitled, I. 555.

ministerial, election to, I. 598.

appointment, I. 598.

who qualified, I. 599.

though not corporators, I. 599.

deed, when necessary, 600, 1, 2, 3, 4.

entry in public books, I. 600, 3.

incompatible, I. 618, 19, 20.

mayor, alderman, or jurat and recorder, I. 618.

town clerk, I. 619.

steward and portreeve, I. 621.

capital burgess, I. 622.

financial officer and his auditor, I. 620.

remedy for exclusion from, I. 725.

by mandamus, I. 725, 6.

delegation of, under special power, I. 782.

not otherwise, I. 782.

See *Criminal Information, Imprisonment, Resignation, Oath, Pleasure, Sacrament, Admission, Deputy, Forfeiture, Amotion, Mandamus, Quo Warranto*.

OFFICER,

judicial, see *Judges*.

ministerial, when several must join, I. 814, 15.

chief, legal, who, I. 98, 99, 100.

when several, I. 790.

when none, I. 102.

duration of his office, I. 755.

when power of holding over, I. 756.

temporary, I. 721.

OFFICER—*continued.*chief—*continued.*

de facto, who is, I. 727.

what acts void under, I. 101. Add. II.

judicial valid, I. 811.

ministerial, I. 812, 13. Add. II.

incidental powers of all equal, I. 790, 1.

punishment for neglecting to preside at election of a successor, I. 112, 13, 14.

for attending religious places of dissenters, I. 816.

See *Title*; *Quo Warranto*.**ORDINANCE,**by custom, see *Custom*.by by-law, see *By-law*.

by charter as to incidental powers, I. 214.

void without acceptance of charter, I. 215.

cannot alter constitution by statute, I. 216.

exclude foreigners, I. 217, 18, 19, 220. Add. III.

impose a forfeiture, I. 221, 22, 23.

give power to imprison, I. 224.

except for contempt, I. 224.

empower to make unreasonable by-laws, I. 225.

may give power to search for ill made goods, I. 223.

by statute what may be, I. 226.

unalterable, I. 227.

may be waived if for private advantage of the corporation, I. 228.

OUSTER, see *Judgment*.**PENALTY,**of by-law recovered by action, see *Action and By-law*.

levied by distress, I. 443, 4.

and sale, I. 445.

detainer of profits, I. 446.

exclusion from profits. I. 447.

imprisonment, I. 448.

must be pecuniary, I. 449.

PEREMPTORY MANDAMUS,

when issued, II. 258, 9. 286. 309.

founded on judgment on a false return in B. R. II. 286. 306. 308.

postea, II. 286. 309.

pursues the form of the original writ, II. 287. 313.

on disallowance of the return, II. 302, 4.

when not, II. 303.

nisi when, II. 305.

on proceedings in mandamus under the statute, II. 307.

on affirmance in D. P. of judgment in B. R. II. 308.

issuing of, stayed by motion for new trial, II. 310.

PEREMPTORY MANDAMUS—*continued*.

- issuing of, not stayed by bill of exceptions, II. 311.
- nor by writ of error, II. 312.
- on criminal information, II. 301.
- service of, II. 314.
- what sufficient obedience, II. 315.
- insufficient obedience, when shown, II. 316.

PERSONS,

- necessary at corporate assembly, I. 90.
- president, I. 94. 106. 126.
- See *Majority*.

PLACE,

- of assembly, guildhall proper, I. 88.
- inn proper for election, I. 88.
- notice of, I. 91.

PLEA,

- to return of mandamus by 9 Ann. c. 20.—II. 248, 9.
- when, II. 250.
- may traverse every fact, II. 250.
- in quo warranto, when put in, II. 435, 6, 7.
- in abatement set aside, II. 440.
- several, II. 443, 4, 5.
- six years' possession, II. 445, 6.
- must show a complete title in defendant, II. 442, 7.
- constitution under which he claims, II. 448.
- defective in this, when cured by verdict, II. 449.
- show charter, II. 451.
- who electors, &c. II. 452.
- time and mode of election, II. 453, 4, 6.
- at a customary court, when, II. 455.
- need not show mere ministerial duty under a custom, II. 456.
- contradictory, in asserting different modes of election, II. 457.
- must show a vacancy when, II. 458.
- election of defendant according to form set forth, II. 459.
- 460, 1.
- conclusion by this authority, II. 462.
- de novo, II. 504.

See *Departure, Judgment, Quo Warranto*.

PLEASURE,

- what offices may be held at, I. 650.
- town clerk, I. 650.
- recorder, I. 650.
- common-council-man, I. 651, 2.
- not aldermen, jurats &c. I. 653, 4.

POLL,

- right of candidates to, I. 552.
- action for refusing, I. 552. 820, 1.

PRESCRIPTION,

- title by, I. 2.
- notwithstanding new charter confirmatory, I. 3.

PRESCRIPTION — *continued.*

- or statute, I. 3.
- or seizure in quo warranto in default, I. 3.
- or judgment final, I. 3.
- or extinction of officers, I. 3. 854, 6.
- revives on revival of suspended corporation, I. 3. 858.
- of a former cannot be transferred to new corporation, I. 4.
- pleaded, I. 5, 6.
- with subsequent charters, I. 5. 7.
- evidence for and against, I. 8, 9. See *Dissolution.*

PRESIDENT,

- at assembly, I. 94. 106. 126.
- head officer, I. 94.
- in that capacity, I. 95.
- when two in one office, I. 96.
- distinct offices, I. 96.
- legal and not de facto, I. 97. Add. II.
- holding over, I. 98, 9.
- notwithstanding elections of officers de facto, I. 98, 9. 100.
- need not be, at select assemblies, I. 106.
- when other than head officer by special provision, I. 105.
- under 11 Geo. I.—I. 107. 108.
- after adjournment of mayor against general consent, I. 110.
- under mandamus, I. 109.
- who is next in place, I. 111.
- must propose or sanction business, I. 103.
- what sufficient proposal, I. 103.
- remain until the act is finished, I. 104.
- capacity under 11 Geo. I.—I. 129, 30.
- his title may be defended in quo warranto by those elected, &c.
- under him, Add. II. 730.
- impeached in quo warranto against those so elect-
ed, II. 472.
- when so, how far protected by 32 Geo. III.—I.
753, 4.

legality of his title put in issue, II. 473. See *Officer (Chief.)*

PRIVILEGE,

- of corporators, I. 795, 6.
- of excluding foreigners may be waved, I. 228.

PROPERTY,

- of members in corporate fund may be rendered liable to corporate
debts before others, I. 328.

QUALIFICATION,

- what may be added by by-law to those having an inchoate right,
I. 311. 382.
- previous freedom in proper company, I.
313, 14. 347, 8. 361, 3.
- may not be, I. 315.

QUALIFICATION—*continued.*

when unimpeachable, though defective, I. 492, 3.

See *Eligible, Disqualification, Residence.*

QUO WARRANTO,

the writ of, in what cases, II. 331.

information in the nature of, by the attorney-general, II. 331, 3.

against individuals for acting as a corporation, II. 335.

for usurping a corporate office, II. 335.

a corporation for usurping a franchise, II. 336.

an officer for usurping a franchise, II. 337.

an officer of a dissolved corporation, II. 338.

at common law by leave of the court, II. 331, 3, 9.

not against a whole corporation, II. 340.

for an equivocal act, II. 341.

for acting in a judicial capacity, II. 342.

against a steward of a court-leet, &c. II. 343.

not of a court-baron, &c. *ib.*

bailiff of an unincorporated town, II. 344.

&c. being returning officer, II. 345.

one voting as by right of burgage tenure, *ib.*

governor of Bedford Level, II. 346.

hundred constable, II. 347.

corporators for admitting non-residents, &c. II.

348, 9.

as burgesses, II. 349, 51.

admitting and amoving, II. 350.

under the statute of Anne, a civil proceeding, II. 352, 3.

there must be a user of the office, II. 354, 5, 6, 7, 8.

but it may be at a past time, II. 359.

not against a whole corporation, II. 360.

against what officers, II. 360, 1.

in what places, II. 362, 3.

in what courts it may be prosecuted, II. 364.

must be by leave of the court, II. 365.

at same time with mandamus, II. 366.

obtained on affidavits, II. 367.

which must be positive, II. 368, 9. 373, 4.

in another case, II. 370.

of one who may not be admitted relator, II. 371.

denying what the deponent had before admitted, II.

372.

setting forth charter must aver its acceptance, II.

375.

rule absolute refused for contradiction in affidavits, II.

376.

cause should be shown on other affidavits besides those

of the defendant, II. 377.

consideration of the court as to granting it, II. 378.

when granted, when refused, II. 379.

QUO WARRANTO—*continued.*

information in the nature of—*continued.*

under the statute of Anne—*continued.*

when refused on the principal ground, not granted on a secondary, II. 380.

granted when eligibility doubtful, II. 381.

infant, *ib.*

non-resident, II. 382, 3, 4.

doubt whether another candidate duly elected, II. 385.

not receiving the sacrament, II. 386.

election doubtful, II. 387.

title of electors being doubtful, II. 387. 392.

for want of due notice, II. 388.

from improper persons being present, II. 389.

want of proper persons, II. 390.

from question as to who could appoint, II. 391.

admission doubtful, II. 393.

office incompatible doubtful, II. 394.

doubtful whether it should be granted, II. 395.

when it will subvert the corporation, II. 397.

on application of a stranger, II. 402.

an inhabitant, II. 403.

one previously elected, but admitted under defendant, II. 404.

corporator, though insolvent, II. 405.

who voted for defendant, his disqualification being latent, II. 406.

who has attended assemblies with defendant, II. 407.

who objected to the defendant's election to the original, but not to the second office, II. 408.

a town clerk, long acquainted with the defect, II. 409.

one who applies as a friend, to enable the defendant to disclaim, II. 410.

to some of the applicants, exclusive of others, II. 422.

refused when there is cause of amotion, II. 396.

for non-residence, though declared to vacate office, II. 396.

when it is to overturn a whole corporation, II. 397.

co-nominee had a questionable title, II. 398.

on the application of the defendant's former legal adviser, II. 411.

a stranger meddling, II. 412.

corporator, if a mere tool, II. 413.

QUO WARRANTO — *continued.*

information in the nature of :

under the statute of Anne :

refused on the application of a corporator whose own title has the same defect, II. 414.

elected under president whose title has the same defect, II. 415.

who has acquiesced in defendant's title, II. 416, 17. Ad. VII.

agreed not to enforce the by-law now insisted on, II. 418.

knowing defect has lain by intentionally, II. 419.

comes to contradict his own entry in the public books, II. 420.

has insidiously discovered the defect, II. 421.

who may be nominal relator, II. 424.

rule for, in what name, II. 427.

not quashed with consent of both parties, II. 429.

but recognizances discharged by consent rule, *ib.*

defendant must disclaim or justify, II. 441.

must show a complete title in himself, II. 442.

does not abate on demise of the crown, II. 465.

several informations against one person, II. 399.

several persons, II. 425, 6.

against different persons, to impeach the same title, II. 400.

where one only tried, II. 426.

See Rule, Time, Seizure, Plea, Replication, Judgment, Costs.

RECORDER,

duration of his office, I. 766.

duty in advising, I. 810. *See Amotion, Pleasure.*

RELATOR. *See Quo Warranto, Amendment, Judgment.*

REPLEADER,

amendment instead of, in quo warranto, II. 505.

when not allowed, II. 506, 7.

REPLICATION,

to the plea to the return to a mandamus, II. 252.

in quo warranto, to plea of six years' possession, II. 467.

demurring to the whole plea and traversing particular fact, II. 468.

may impeach title to another office, if a necessary previous qualification, II. 470.

may put any number of matters in issue, II. 469.

not in due manner assembled, good, II. 472.

not duly elected, II. 475.

so many votes for one, so many for another, argumentative, II. 477.

RESIDENCE,

previous to election, I. 481.

during office, I. 481.

RESIDENCE—*continued.*

what sufficient, I. 483, 4, 5, 6, 7, 8, 9.
in several places, I. 489.

RESIGNATION,

of office punished by by-law, I. 308.
what is, I. 612.
by deed, I. 610.
parol, I. 611, 12.
acceptance of incompatible office, I. 617, 23. Ad. IV.
whether superior or inferior, I. 618.
though election voidable, I. 618. Ad. IV.
second office, though not incompatible, I. 624.
acceptance by corporation, I. 613, 16.
when revocable, I. 613. 618. Ad. IV.
avowment of, generally, I. 610, 14.
particular facts, when necessary, I. 615.
acceptance of, I. 616.

See *Mandamus, Return.*

RESTORATION,

mandamus for, after election to incompatible office, I. 623.
mandamus for, I. 705.
by whom, I. 706.
when unnecessary, I. 708.
effect of, I. 707.
for what period when removed from mayoralty, I. 757.

See *Mandamus, Peremptory Mandamus.*

RETURN,

to habeas corpus. See *Habeas Corpus.*
mandamus :
when under statute, II. 168, 9, 70, 73.
in other cases, II. 171, 3.
anciently, II. 167.
time allowed for making, II. 174.
how to be made court will not direct, II. 178.
by whom made, II. 175.
when writ to mayor and burgesses, II. 176, 7. 323.
filed after death of him who made it, II. 172.
must be certain, II. 179. 183.
state facts, II. 180.
negative constitution in the writ, when, II. 182.
rely on misnomer, or waive it, II. 184.
answer the writ in substance, II. 185.
not be argumentative, II. 181.
recitative, II. 181.
show incapacity to obey not arising from collusion, II. 186.
all powers necessary to warrant their acts, II. 187.
need not aver possible facts, which may more properly be shown by
the other side, II. 188.

RETURN — continued.

to mandamus :

need not set out proceedings on which a judgment is founded,
II. 189.

be good in all parts, II. 190.

confined to one cause for not doing the act, II. 191. 210.

but if several causes, they must be consistent, II. 192.

be signed or sealed, II. 193.

if defective in substance cannot be cured by any inference, II. 212.

cannot be taken off the file, II. 194, 5.

to mandamus to elect :

election on day after charter-day, II. 198.

by steward, that he had held a court, empanelled a jury, and
they found the office full, II. 199.

or the prosecutor not elected, *ib.*

insufficient number of electors, II. 197.

charter-day slipped, and no election can be until the next,
II. 196.

to mandamus to admit :

not elected, II. 201.

at a certain time, II. 208.

not duly elected, II. 201, 2.

neither of the prosecutors elected, II. 206.

ouster in quo warranto, II. 200.

not received the sacrament, II. 204.

taken the oath of allegiance, II. 205.

paid the fee on admission, II. 211.

must negative the constitution in the writ, if it rely on a dif-
ferent, II. 203.

take issue on some fact alleged in support of the elec-
tion, II. 203.

and not on the conclusion from the facts, II. 203.

show the defect in the corporate assembly, if it admit
one at the time apparently competent, II. 207.

office full, II. 213.

insufficient to be deputy, II. 209.

not free of the company of his trade, II. 214.

admissible on certain days only, II. 215.

to mandamus to restore ;

outlawry of prosecutor, II. 217.

resignation, II. 219, 20, 1, 2.

amotion, essentials of, II. 223.

of officer at pleasure, II. 224. 231. 244, 5.

cause of set forth, II. 226, 7.

non-residence, II. 228, 9.

offence in his office, II. 230.

power of, in whom, II. 232.

notice of to those who amove, II. 233.

person amoved, II. 235. 6, 7, 8.

RETURN—*continued.*

- to mandamus to restore :
 - motion, assembly for, II. 233, 4.
 - charge on which founded, II. 239.
 - proved or confessed, II. 240.
 - by whom, II. 241.
 - in what form, II. 242.
 - office annual, II. 243.
 - original disqualification, II. 246.
- false, action on :
 - to habeas corpus, I. 422.
 - to mandamus. See *Action*.

REVIVAL,

- by stat. 11 Geo. I. — I. 854, 5.
- charter :
 - in what name, I. 870.
 - in what form, I. 874.
 - acceptance of, *ib.*
 - in what words, I. 870.
 - re-grant of franchises, I. 872.
 - effect of, I. 873.
 - when cannot be, I. 875.
- by proclamation and acceptance, I. 871.

RIOT,

- in proceeding to election, indictment for, I. 823.
- criminal information, I. 824.

RULE,

- to inspect. See *Documents*.
- nisi, for mandamus, direction of, II. 117.
- enlarged, II. 117, 18.
- discharged on account of obedience, II. 119.
- cause shown to, II. 120.
- contradiction of prosecutor, II. 121.
- affidavits showing, must state when sworn, II. 122.
- absolute, when, II. 123.
- must describe the writ, II. 125.
- by whom drawn up, II. 127.
- affidavits of defendant produced to aid in drawing it. II. 126.
- to plead, &c. in quo warranto, II. 437, 8.
- See *Mandamus*, *Quo Warranto*.

SACRAMENT,

- must be received within a year before election to office under 13 Car. II. I. 506.
- by officers, even common council-men, I. 507.
- not by mere freemen, I. 479. 507.
- not dispensed with as disqualification by 5 Geo. I. until after admission, I. 508.
- or annual indemnity act, I. 508.

SACRAMENT — *continued.*

omission of equivalent to refusal of office, I. 509. 596, 7.

acceptance of when must be shown in quo warranto, II. 464.

SEIZURE,

in quo warranto on default, II. 330, 1, 2, 3.

final judgment, II. 487.

SELECT BODY,

constituted by by-law, I. 253. 284, see *Election, By-law.*

SERVICE,

of mandamus on whom, II. 161.

of personal, II. 162.

STATUTE,

title of corporation by, I. 10.

mode of incorporating by, I. 10.

needs no acceptance, I. 11.

ordinances of unalterable, I. 11.

may confer extraordinary powers, I. 12.

See *Confirmation, Revival, Election, Ordinance.*

SUING,

by-law restraining in king's courts void, I. 331. 683.

for paying expense of for supporting election or interest of
individuals void, I. 327.

SUMMONS,

on quo warranto, II. 430.

SURRENDER,

of charter void, I. 862, 3.

unless enrolled, I. 877.

See *Dissolution.*

TALLIAGE,

what may be levied by by-law, I. 318. 326.

See *Rate, Fees.*

TESTE. See *Writ.***TIME,**

of assembly by new calendar, I. 86.

at what hours generally, I. 87.

under 11 Geo. I. See *Election.*

between teste and return. See *Writ.*

on distringas in quo warranto. See *Distringas.*

allowed for pleading &c. in quo warranto, II. 435, 6, 7. 466.

See *Mandamus, Return.*

TITLE,

founded in election or inchoate right, I. 720.

completed by admission, I. 720.

by patent, &c. I. 723.

without admission, I. 723, 4.

examined in quo warranto, when defendant, I. 728.

when another is defendant, I. 729.

originally defective protected by the court, I. 732.

TITLE—*continued.*

originally defective:

by omitting the sacrament how far aided by 5 Geo. I.—I. 733,
6, 7, 8, 9.

not aided until after admission, I. 735.

how far aided by annual indemnity act, I. 741, 2, 3, 6.

though elected after the passing of the act, I. 744.

what title within its protection, I. 745.

protected after six years' possession under 32 Geo. III.—
I. 747.

time how calculated, I. 748, 9.

similar to former rule of court, I. 749.

as to former acts, I. 749.

when second officer depending upon it, I. 751.

See *Quo Warranto, President.*

TOWN-CLERK,

duration of his office, I. 766. See *Amotion, Pleasure.*

TRADE,

by-law restraining members from trading on a separate account.
I. 329.

regulating to prevent monopoly, I. 333, 4.

preventing fraud in, I. 335.

admitting foreigners to, 341.

excluding foreigners from, I. 342, 3.

requiring apprenticeship to, 344, 5, 6.

approval by company of, I. 345, 6.

See *By-law, Custom, Qualification.*TRAVERSE. See *Replication.*

TRIAL,

in mandamus at bar when moved for, II. 251.

when it may be under statute, II. 253, 4:

in next county, II. 255.

new, even after trial at bar, II. 257.

after verdict for prosecutor without damages, II. 259. 271.

in quo warranto in next county, II. 479.

at bar, II. 480.

new, even after trial at bar, II. 481.

USURPER,

is eligible during his usurpation, I. 512.

VACANCY,

must be at time of election, I. 526.

of office to which the election is, I. 527.

by illegal amotion avoided by restoration, I. 528.

election to the next which shall happen gives no title, I. 526.

See *Plea, Quo Warranto, Mandamus.*

VOTE,

of all in the corporate assembly equal, I. 133. Ad. V.

